Reverse
Young 8-641
Ap. 1. 1878. Acq

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 781.

JOHN YOUNG, TRUSTEE IN BANKRUPTCY OF ALEXANDER COLLIE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 3, 1877.

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INDEX.

	Original.	Print.
I. Original petition, filed June 11, 1867	1	1
II. Traverse	2	2
III. Special pleas	2	2
IV. First findings of fact and conclusion of law set aside by new trial	3	3
V. Opinions on the first findings of fact, to wit:		
1. Opinion of the court by Judge Loring	3	4
2. Dissenting opinion by Judge Nott	7	9
VI. Judgment of court in favor of claimant, May 15, 1874, set aside by new trial	9	10
VII. Application of defendants for allowance of appeal and order allowing same	9	11
VIII. Motion of defendants for new trial, filed December 5, 1876	10	11
IX. Order of court granting new trial, January 8, 1877	11	11
X. Application of claimant for allowance of appeal from said order of January 8, 1877	11	12
XI. Order of court refusing said appeal	12	12
XII. Transcript from the journal of the court setting forth the filing by the defendants of the order of the Supreme Court dismissing the appeal from the judgment of May 15, 1874	12	12
XIII. Order of the court substituting John Young as trustee, as party claimant	13	12
XIV. Findings of fact and conclusion of law	14	12
XV. Opinions:		
1. Opinion of the court by Chief Justice Drake	20	19
2. Concurring opinion of Judge Richardson	22	22
3. Concurring opinion of Judge Nott	33	34
XVI. Request of defendants for additional findings of fact and rulings of the court thereon	41	44
XVII. Final judgment of the court dismissing the petition, June 29, 1877	45	46
XVIII. Application of claimant for allowance of appeal and order allowing same	46	46
XIX. Certificate	47	46

1 In the Court of Claims of the United States.

ALEXANDER COLLIE
vs.
THE UNITED STATES. } 2,726.

I.—*Petition.* Filed June 11, 1867.

To the honorable the judges of the Court of Claims:

Your petitioner, Alexander Collie, an alien and a subject of the Queen of Great Britain and Ireland, and resident of London, England, respectfully shows unto your honors:

That at the time of the capture of the city of Savannah, by the forces of the United States, under the command of Maj. Gen. William T. Sherman, and in the month of December, in the year one thousand eight hundred and sixty-four, he was then and there possessed in his own right of four thousand nine hundred and thirty-six bales of cotton, which were then and there his own property, and which were then and there duly stored, marked, and numbered; that all of the said bales of cotton were captured and taken possession of by the said forces under the command aforesaid, and were soon thereafter delivered to and received by one Simeon Draper, a duly authorized agent of the Treasury Department of the United States, by whom the same were forwarded, against the will and without the consent of your petitioner, to the city of New York, and were there by him sold, and the proceeds thereof paid into the Treasury of the United States; that your petitioner is not accurately advised as to the actual amount of the proceeds of such sale, so paid into the treasury as aforesaid, but on information and belief he alleges the same to have been not less than nine hundred thousand dollars in gold.

Your petitioner claims the amount of the proceeds of the said cotton, less the lawful expenses attending the sale, transportation, and disposition thereof.

And your petitioner further shows that he is the owner of the said bales of cotton, and is justly entitled to the proceeds thereof under and pursuant to the provisions of the act of Congress of the United States, approved March 12, 1863, entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States," (12 U. S. Stat. at Large, 820;) that he has at all times borne true allegiance to the government of the United States, and that he has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said government.

CLARENCE A. SEWARD,
Attorney for claimant, 29 Nassau street,
New York, P. O. Box 217.

Post-office address of the claimant, London, England.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK. } *ss.*

William E. A. Mackintosh, being duly sworn, says that he is the agent for the claimant above named; that no assignment or transfer of said claim or any part thereof, or any interest therein, has been made; that the said claimant is justly entitled to the amount in said petition claimed from the United States, after deducting all just credits and offsets; and that he believes the facts as stated in said petition are true.

WILLIAM E. A. MACKINTOSH.

Sworn to before me this 10th day of June, 1867.

[L. S.] JOSEPH GUTMAN, JR.,
United States Commissioner duly appointed by the Circuit Court of the United States for the Southern District of New York in the Second Circuit.

[Internal-rev. stamp, 5c. Cancelled.]

2 II.—*Traverse.* Filed Sept. 9, 1867.

And the said defendants, by their solicitor, E. P. Norton, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of nine hundred thousand dollars, $900,000 (in gold,) the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, the said defendants deny the said allegation, and call for proof thereof.

And for a further plea to the said petition the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because, they say, that the said claimant did not, "within two years after the suppression of the late rebellion, prefer his claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided.

E. P. NORTON,
Solicitor for the United States.

III.—*Special Pleas.* Filed July 17, 1869.

And for a further plea to the said petition the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because, they say, that the

said claimant did not, "within two years after the suppression of the late rebellion, prefer his claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

T. LYLE DICKEY,
Assistant Attorney-General.

And for a further plea to the said petition the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because, they say, that the said claimant, at the time of the filing of his said petition, was an alien, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents therein set forth, were made and done in the administration of, and in virtue and under color of, the act of Congress entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

Whereby and by virtue of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the government, and for the better defence of the treasury against unlawful claims," approved July 27, 1868, the claimant is barred of his said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney-General.

3 IV.—*First findings of fact and conclusion of law set aside by new trial.*

The petitioner claims the net proceeds of 4,936 bales of cotton, and the court finds the facts to be—

That the petitioner is a subject of the kingdom of Great Britain, and was resident in England during all the time of the transactions hereinafter stated.

That from some time in 1862 till December, 1864, the petitioner purchased in the Confederate States large amounts of cotton, through the agency of Theodore Andrae, acting under orders given to him in 1862, in England, by the petitioner to purchase cotton, and draw on the petitioner for funds that might be required to complete said purchases.

That in December, 1864, at the capture of Savannah, the petitioner owned and was possessed of 1,757 bales of sea-island cotton and 3,096 bales of upland cotton, stored in the city of Savannah, to be ready for shipment to New York or England at the termina-

tion of the war; and all of said cotton was seized and taken from the possession of the petitioner by the United States, who sold the same; and its net proceeds, amounting to the sum of $952,076.71, were paid into the treasury.

That during the late rebellion the petitioner was engaged in running the blockade of the southern ports, by the importation and exportation of merchandise which was not "material of war."

And on the facts stated the court finds that the petitioner is entitled to recover of the United States the net proceeds of said cotton, amounting to the sum of $950,076.71.

And the court finds, as a conclusion of law, that the petitioner, being before, and during, and since the rebellion a subject of Great Britain, and resident therein, is not barred of this action by having imported during said rebellion goods not munitions of war into ports of the Confederacy declared by the President's proclamation to be in a state of blockade, as set forth in proclamation of 19th of April, 1861.

By the court.

V.—*Opinion of the court and dissenting opinion upon the first findings of fact.*

LORING, *J.*, delivered the opinion of the court:

The statement of facts finds that the claimant, a subject of and resident of Great Britain, during the rebellion imported goods not munitions of war into the ports of the Confederacy. But this was not in him any offense against any law to which he was subject. He was a citizen of a neutral nation, and the law which made the rule and the rights between him and the United States was the law of nations; and under the law of nations, as contended by the claimant's counsel and shown by the authorities he cited, a belligerent cannot prohibit neutrals from trading with its enemy. It can only prevent it, and the difference is very wide, for it involves the right of neutrals to trade with either belligerent, and that right is as clear and certain as it is important to the world's commerce, and a belligerent can only prevent neutrals from trading with its enemy by a blockade efficient for prevention. That is the absolute condition annexed by the law of nations to the use of a blockade, and by its careful discrimination between a paper blockade, which it disclaims and denies, and an actual blockade, which it alone permits, the law of nations says to the belligerent you may keep the neutral vessel out if you can, and it says to the neutral vessel you may get in without force if you can. It thus gives to each a clear and definite right, and this petitioner, in importing his goods into the port of the Confederates, was as much in the exercise of his right under the law of nations as the United States were in the exercise of their right in attempting to prevent it; and the fact that the petitioner succeeded in the importation of his goods is evidence that

under the law of nations he had a right to do so, because it is evidence of the fact that the United States had not performed the condition on which only, under the law of nations, they
4 had a right to a blockade at all, i. e., by establishing a blockade efficient for prevention. The proposition of Lord Stowell as to the required completeness of a blockade is of universal admission, and he said as follows: "The very nature of a complete blockade includes that the besieging force can apply its power to every point of the blockaded state. If it cannot, then there is no blockade of that part where its power cannot be brought to bear."—(1 Rob., 80; 4 Rob., 66; 1 Acton, 64.)

It is true that a neutral vessel, in attempting to enter a blockaded port, is liable to seizure, but that seizure is not made under the municipal laws of the blockading power, nor for any offense against them, but by its right as a belligerent and under the law of nations, which authorizes it to treat not as a criminal, but as an enemy, those who come to the aid of its enemy.

We are, therefore, not dealing here with a criminal or an offender against our laws or any laws, but with one who has exercised his right as a neutral by importing merchandise not munitions of war into ports of the Confederacy, when and where he had the right of entry under the law of nations.

And those laws are a part of the laws of the land, and they involve its highest policy, that of maintaining its good faith and good repute among the nations; and the maintenance of these is the highest duty that can be committed to a judicial tribunal. And that duty belongs to legislatures as well, and therefore a municipal law punishing, directly or indirectly, treasonable offenses as such must, by construction, be confined in its application to our own citizens or aliens resident here, who thereby owe allegiance here.

Nor can there be imputed to the claimant any intent of violating our municipal laws, nor anything more than the fact of aiding the rebellion without that intent, for his intent in importing goods not munitions of law was his own gain in a trade lawful to him by the law of nations, and which trade is so made lawful to him because its intent is the profits of trade, and not the assistance of one of two belligerents.

And the petitioner did not seek to avoid duties or the payment of any legal burdens on his traffic, and it cannot be assumed that he failed to comply with the existing requirements of the ports into which he entered, and if the authorities there were other than those of the United States it was not his fault.

Neither is the petitioner at our bar by any grace, sufferance or comity, but by his right, secured to him by our statute of July 28, 1866, in exchange for the right his sovereign gives to our citizens to sue him in his courts. And this right has been assured to him by our decisions, affirmed by the Supreme Court, under which our government is held to be a trustee for aliens, as well as for our own citizens.

It may be true that our government did not, in matters between them and the citizens of the Confederacy, admit them in all respects to be belligerents. But it certainly is true that foreign nations, and England among them, both for their governments and citizens, recognized the Confederates as belligerents and established their relations with them accordingly; and if our government objected to this diplomatically, it never practically enforced its objection; and it was, so far as Great Britain was concerned, definitively abandoned in final settlement by the treaty of Washington. And that during the rebellion the Confederates were belligerents cannot now be brought into question with the English government or an English subject.

Thus much for the status of the petitioner at our bar.

The facts in this case sever the crime of aiding the rebellion from the act of aiding it. They are entirely distinct things, and, as this case shows, have no necessary co-existence, and their difference and distinctness are recognized under all law and in all courts, civil and criminal. The law of nations recognizes the difference in holding that, where the citizen of a neutral nation gives aid and comfort to one of two belligerents, the other may treat him as its enemy under the laws of war, and not as a criminal under its municipal law. So all criminal courts distinguish between the act and the crime, which is only the moral and legal quality of the act, for in criminal courts pardon purges the crime, and absolves the criminal from its penal consequences; but it does not alter the act, for a thing done is unalterable, and no law or court feigns imperception of that, or rests its action on the fiction of an impossibility. So all civil courts, in their administration of the law, distinguish between the act and the crime, for, if a man forges my name to a promissory note, and is pardoned for it, his crime is purged, and, as it is metaphorically said, thereafter no court can see it. But the court can and will thereafter see the act; for, if the man sues me on the note, I may plead and prove the forgery, and certainly the replication of a pardon would be demurrable and bad in law.

And the language of all text-books and decisions distinguishes between the act and the crime, for they habitually, and in the common accuracy of expression, confine the absolving power of a pardon to the crime and its penal consequences. Thus Justice Blackstone (4 Blk. Com., 402) says: "Pardon makes the offender a new man, and acquits him of all corporal penalties attached to that offense for which he obtained pardon." And offense, when used in reference to pardon, necessarily means crime. So Bacon's Abridgment (v. 7, p. 416) says: "Pardon removes not only punishment, but all the legal disabilities of crime." And the language of decisions is as precise. In 7 Peters, 150, Chief Justice Marshall defined a pardon thus: "A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual from the punishment the law inflicts for a crime he has committed."

It would seem to be necessarily certain that the Supreme Court, in its decisions that the words in the act of 12 March, 1863, "never given aid and comfort to the rebellion," referred to the crime, did not, and could not, overlook a difference so manifestly existing in fact, and so clearly stated in elementary treatises and authorities, and so certain to occur in practice; and the cases they have decided show that they did not.

Thus in the case ex-parte Garland, the Supreme Court said: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out the existence of the guilt, so that, in the eye of the law, the offender is as innocent as if he had never committed the offense." And again they said, in the same case: "The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offense of treason committed by participation in the rebellion. So far as that offense is concerned, he is thus placed beyond the reach of punishment of any kind." It would be certainly difficult to select language which would more clearly distinguish between the crime pardon will legally purge and the act that is unalterable. The industry of the learned counsel for the defendants has found the only case in which the language of the court has not distinguished between the act and
6 the crime; and in that case they co-existed, and there was no need of distinguishing between them. In Carlisle and Henderson, (16 Wall., 147,) the court said in one sentence thus: "The pardon and amnesty do not and cannot alter the fact that aid and comfort were given by the claimants, but they forever close the eyes of the court to the perception of that fact as an element in its judgment." But all the language of the Supreme Court in that case must be construed together. And in a subsequent part of the case, on the same page, the court refers to the effects of pardon, as to which its members agree, and to those as to which they differ, and the statement is as follows: "There has been some difference of opinion among the members of the court as to cases covered by the pardon of the President, but there has been none as to the effect of and operation of a pardon in cases where it applies. All have agreed that the pardon not only releases the offender from the punishment prescribed for the offense, but that it obliterates, in legal contemplation, the offense itself."

Now, in the sentence first cited from this case of Carlisle and Henderson, the Supreme Court says: "The pardon and amnesty do not alter the actual fact," and in the sentence secondly cited they say that the court all agree that pardon "obliterates the offense;" and we think that in this case cited, and all the like cases decided by the Supreme Court, their language shows that they distinguished between the act and the crime, and held that the third section of the statute referred to the crime and that only; for in every case in which the Supreme Court has decided that a claimant, because of

his pardon, was entitled to recover, the fact that he aided the rebellion was clear and unaltered, and yet by the decision formed no impediment to his recovery.

And in Pargoud's case, where pardon had obliterated the crime and the unalterable fact was all that remained, we held it was efficent per se to prevent a recovery, and the Supreme Court reversed our decision.

By the decision of the Supreme Court, pardon obliterates the crime and proves its non-existence, and thus supports the allegation a claimant is obliged to make in his petition and prove on trial, viz., that he "never gave aid and comfort to the rebellion;" and that is all the pardon does. But pardon is only one way of proving the non-existence of crime, and another equally legal and efficient way is to prove by circumstances that the claimant could not have committed the crime; and that is done here, for it is shown that this claimant, at the time of his importations, and since, was a subject of Great Britain and resident therein, and owed allegiance there, so that his act was not by our laws treasonable, and under the law of nations was not criminal.

The argument for the defendants is, that the third section of the act of March 12, 1863, conditions a recovery under it on proof that a claimant never gave aid and comfort to the rebellion; that it is proved the claimant gave such aid and comfort, and that he had not been released of its consequences by any Executive pardon. As allegations of fact this is all true, but we think the defect of the propositions, as an argument is that, as such, it rests on the literal meaning of the words "never given aid and comfort to the rebellion," instead of on their legal meaning and the legislative intent in their use, as these are conclusively fixed for us by the decisions of the Supreme Court, by which the words cited are referred to the crime and not to the act of aiding the rebellion.

And the application of the argument of the defendants that we are called upon by them to make, is, to refer the word of the statute, as to aid and comfort to the rebellion, in the cases of our
7 own citizens and aliens resident here and owing allegiance here, exclusively to the crime and not at all to the act; and in the case of aliens not resident here, and not owing allegiance here, exclusively to the act and not at all to the crime. And certainly that is the only way of bringing this action within the bar set up for the defendants. But we think the rules of construction require us to construe the words of the statute in the same way as to all persons.

As suggested at the bar, the original theory of this court was that the jurisdiction of the crime of aiding the rebellion was given to other courts of the United States of criminal jurisdiction, and under other statutes than that of 12 March, 1863, and that this court of civil jurisdiction had nothing to do under that act but to find a fact on which was conditioned the return of property, vested in the

United States by capture jure belli, to its original owners. But this theory has been reversed in all its parts by the Supreme Court, which has decided that the act of 12 March, 1863, requires us to find the crime of aiding the rebellion. And we think this confines the application of the statute to those owing allegiance here. And whether in the decisions of the Supreme Court the crime of aiding the rebellion has or has not been considered apart from the act, they must be considered apart here, for the facts so present them. And it being now the settled doctrine that the statute contemplated the crime and barred recovery as a punishment for that, we think the reasonable inference is that Congress did not intend to punish for treason a foreign subject because he had used his right as a neutral under the law of nations.

NOTT, *J.*, dissenting:

I agree fully as to the general principles ably and elaborately discussed in the opinion of the court, and differ only as to its conclusion. The case before us, I think, is governed by the following propositions:

I. The amended Court of Claims act (12 Stat. at L., p. 765, § 12) provides, "That in order to authorize the said court to render a judgment in favor of any claimant, if a citizen of the United States, it shall be set forth in the petition that the claimant and the original and every prior owner thereof, where the claim has been assigned, has at all times borne true allegiance to the government of the United States, and whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, which allegations may be traversed by the government, and if, on the trial, such issues shall be decided against the claimant, his petition shall be dismissed."

II. The Supreme Court has decided that the abandoned and captured property cases are "subjects of jurisdiction" to be determined according to the provisions of this general act.—(Zellner's Case, 7 C. Cls. R., p. 137.)

III. The general amnesty proclamation, December 25th, 1868, (15 Stat. at L., p. 711,) while it relieves a citizen from making proof of his compliance with the provisions of the statute, (Mrs. Armstrong's Case, 7 C. Cls. R., p. 280,) and even from pleading his innocence according to its requirements, (Pargoud's Case, Id., p. 289,) and extends to a resident alien who owes only a temporary allegiance, (Carlisle & Henderson's Case, 8 C. Cls. R., p. 153,) cannot be extended to the case of a non-resident alien who owes no allegiance and can be guilty of no offense. The conclusion reached by the majority of the court that blockade-running was not an offense against the laws of the United States seems to me a conclusive reason that the pardoning power cannot help the suitor; for the power of the President to pardon is limited to "offenses against the United States," and "offense" in

8

law is nearly synonymous with "crime," and comprises only those acts to which the law affixes a penalty or punishment. The President may remit a fine or a penalty, but he has no power to remit the forfeiture of a bail-bond.—(4 Peters' R., p. 144.) With the obliteration of "offenses" known to the law, having attached to them the tribute of punishment, the pardoning power ends. The statute which has been quoted recognizes the difference between those who owe and those who do not owe "allegiance" to the government. As to the former class, who have violated that allegiance, the Constitution enables the President to restore them to the condition of legal innocence. As to the latter class, who, being beyond the pains and penalties of the law, are also beyond the pardoning power of the Executive, the Constitution does not authorize the President to re-open for them the courts of the United States which have been closed by express legislative enactment.

IV. The courts of the United States being closed to the claimant, his redress, if he be entitled to any, for "acts committed" against his property by the government of the United States during the rebellion should have been sought under Article XII. of the treaty of Washington. The purpose of the abandoned or captured property act, (12 Stat. at L., p. 820,) as construed by the Supreme Court, was to create a trust for those citizens who faithfully adhered to the government during the rebellion, and for those who, not adhering, should afterward be restored to their rights by the executive clemency. It could not have been the purpose of the statute to create a trust for the benefit of a foreigner then carrying on an illicit traffic with the armed enemies of the United States in violation of their blockade and against their declared public policy, nor to allow him to come into a court of the United States as a matter of right and enforce the trust the moment the rebellion ended.

V. Apart from the statutes and apart from the aid and comfort given to the rebellion by blockade-running, it is a controlling principle that the courts of a country will not aid a foreigner to accomplish that which the laws of the country forbid to its own citizens. The title to this cotton was acquired by a non-resident alien during the rebellion, in a blockaded port. The business was conducted through the instrumentality of blockade-runners and against the public policy of the United States. The claimant occupies the position of a smuggler. If he had acquired the fruit of his traffic, the courts of the United States would not disturb him in his possession. Conversely, if the forbidden traffic failed to reach a result, he cannot ask the courts of the United States to aid him in acquiring this property against the declared policy of the United States.

9 VI.—*Judgment of the court in favor of the claimant, rendered May* 15, 1874, *set aside by new trial.*

At a Court of Claims held at the Capitol, in the city of Washington, the fifteenth day of May, A. D. 1874, judgment was ordered to be entered up as follows:

The court, upon the consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Alexander Collie, claimant, do have and recover of and from the United States the net proceeds 1,757 bales of sea-island cotton, at $231.79 per bale, and of 3,096 bales of upland cotton, at $175.33, making in the aggregate the sum of nine hundred and fifty thousand and seventy-six dollars and seventy-one cents, ($950,076.71.)

By the court.

VII.—*Application of defendants for allowance of appeal, and order allowing same.*

From the judgment rendered in the above-entitled cause, on May 15, 1874, in favor of claimant, the defendants, by their Attorney-General, on the 30th day of June, 1874, make application for and give notice of an appeal to the Supreme Court of the United States, the amount in controversy in said cause exceeding the sum of three thousand dollars, to wit, nine hundred and fifty thousand seventy-six dollars and seventy-one cents.

JOHN GOFORTH,
Assistant Attorney-Gen'l.

Filed June 30, 1874.

AT CHAMBERS.

Allowed:

C. D. DRAKE, *C. J.*

10 VIII.—*Motion of the defendants for a new trial.* Filed Dec. 5, 1876.

And now comes the Attorney-General in behalf of the United States and moves the court to grant to the United States a new trial in the above-stated case lately decided in this court, and that an order may be made staying the payment of the judgment so rendered in favor of said Alexander Collie, the said claimant.

And the Attorney-General herewith submits to the court in support of this motion the affidavits of sundry witnesses, taken abroad by the counsel of the United States, and sundry papers and documents duly proved and verified, which the United States *the United States*, by its Attorney-General, says has been discovered and obtained since the trial of the case, and which evidence the United States, by its Attorney-General, insists should satisfy the court that fraud, wrong, and injustice in the premises have been done to the United States by the recovery by said Collie of said judgment.

ALPHONSO TAFT,
Attorney-General.

11 IX.—*Order of court granting new trial.*

At a Court of Claims held at the Capitol, in the city of Wash-

ington, on the 8th day of January, A. D. 1877, it was ordered that the motion for a new trial in the above case be allowed.

By the court.

X.—*Application of claimant for appeal from an order granting new trial.* Filed April 2, 1877.

Now comes the said claimant by his attorney and moves that an appeal be allowed to the Supreme Court of the United States from an order and judgment of this court granting a new trial heretofore rendered in this case.

C. F. PECK, *Att'y for Claimant.*

12 XI.—*Order of court refusing the appeal from the order granting a new trial.*

At a Court of Claims held at the Capitol, in the city of Washington, on the 9th day of April, A. D. 1877, it was ordered that the motion for the allowance of an appeal heretofore filed in this case be overruled.

By the court.

XII.—*Filing of order of Supreme Court dismissing appeal from the judgment rendered May* 15, 1874.

At a Court of Claims held at the Capitol, in the city of Washington, on the 16th day of April, A. D. 1877, Mr. Assistant Attorney-General Simons filed an order of the Supreme Court of the United States dismissing the appeal heretofore taken in this case.

substituting

13 XIII.—*Order of court ~~sustaining~~ John Young as trustee, as party claimant.*

At a Court of Claims held at the Capitol, in the city of Washington, on the 24th day of April, A. D. 1877, the following order was made in this cause, to wit:

It appearing to the court that Alexander Collie, the claimant in this cause, was on the 19th day of August, 1875, by the order of the London Bankruptcy Court, duly adjudged a bankrupt, and that John Young was duly appointed trustee of the property of said Alexander Collie in pursuance of such adjudication,—

It is ordered that the said John Young, as trustee as aforesaid, be substituted as the claimant in this cause for and in lieu of the said Alexander Collie.

By the court.

14 XIV.—*Findings of fact and conclusions of law.* Filed June 21, 1877.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. Alexander Collie, on whose behalf this suit was instituted, and in the name of whose trustee in bankruptcy the same is prosecuted, was a subject of the Queen of Great Britain and Ireland, at one time residing in Manchester, England, as a member of the firm of Alexander Collie & Co., but in the years 1862, 1863, and 1864, residing and doing business, in his own name, in London, England, and he has at no time been in the United States.

II. In the year 1862 the said Collie engaged in fitting out, lading, and sending steamships to run the blockade of the ports in states which were then in rebellion against the United States, and for about two years he continued engaged in that business, sending a large number of such vessels for that purpose, which succeeded many times in running the blockade, in and out, and carried into some of those ports general merchandise which was there sold, and also munitions of war, to wit, arms, gunpowder, armor-plates for war vessels, army clothing, cannon, shot, ammunition, and quartermaster and medical stores, which were purchased in England by said Collie, or by agents of the so-called Confederate States of America, to whom, in aid of such purchases, the said Collie made large advances of money, and when said munitions of war were run into said ports they were delivered to the government of said Confederate States. The vessels so engaged in running the blockade took back from said ports to said Collie large quantities of cotton, partly received from said government in payment for the munitions of war and other things received from him, and partly bought for him by his agents in those states with moneys derived from the sales there of the cargoes of merchandise taken into said ports by the ships of said Collie. The cotton, for the recovery of which this suit was brought, was purchased by said Collie's agent in the said Confederate States with moneys so derived.

The said Collie on the 1st of October, 1863, addressed the following letter to John White, special commissioner for the State of North Carolina, then in England:

"No. 1.] 22A AUSTIN FRIARS, LONDON,
"*1st October*, 1863.

"JOHN WHITE, Esq.,
"*Special Com'r for North Carolina:*

"DEAR SIR: Being desirous of aiding in any way in my power the government of your state in its present struggle, it seems to me that the time has come when this can be done very efficiently, and, with this view, I now ask your careful consideration of the following propositions:

"From all I can learn, the chief requirement of your country at the present moment, as far as concerns business here, is to receive supplies of railway iron, rolling-stock, and a few other articles, with regularity, expedition, and economy. To effect this I propose—

"First. To furnish, with as little delay as possible, four steamers, of the most suitable description for blockade running, of which your state will own one-fourth interest, the other three-fourths being held by myself and friends.

"Second. To give up to the government of your state, when required, the entire inward carrying-power of said steamers from the island to the Confederacy at a moderate rate, to be fixed hereafter.

"Third. That the government of your state be entitled to one-fourth space of the *outward* carrying-power of each steamer, for cotton or other produce; and this arrangement will, I estimate, yield to your state funds sufficient to pay cost and all charges on *inward* cargo, cash of its share of *outward* cargo, and (if cotton of good quality be sent out) a very large surplus will be left at the credit of your state on each trip. If at any time there should be a deficiency of cargo for government or other account, freight will be taken, if procurable, from other parties, and a due share of any freight so carried will be credited to the state. In a business such as that now sought to be inaugurated, it is manifestly impossible to provide for all contingencies which may arise; all I can at present do is to indicate the chief aims, objects, and conditions. The rest must be left to the good faith and honorable dealing of the government of your state on the one part, and of myself on the other. I need hardly add that any propositions from your government for altering or amending any of the conditions you and I may agree to will be met by me in the most liberal spirit, and that I place the same implicit confidence in the good faith of the governor and government of your state I ask them to place in me.

"I remain, dear sir, yours, faithfully,

(Signed) "ALEX. COLLIE."

On the 27th of October, 1863, the said Collie and the said White entered into the following agreement:

"With the view of carrying out efficiently the business indicated in the preceding letter of 1st instant, it is hereby agreed by Alex. Collie, for himself and friends on one part, and John White, of North Carolina, for the governor of that state, on the other part, that Alex. Collie will furnish four steamers of suitable construction and speed as soon as practicable; that one-fourth interest in each of these steamers will belong to the government of North Carolina, three-fourths owned by Alex. Collie and friends. The government will pay their share of the costs and outfit of such steamers by cotton-warrants (Manchester issue) at par, and the working expenses of such steamers will be paid by the respective owners, in their due proportion; that is, one-fourth of the working expenses will be paid by the government of North Carolina, and three-fourths by the other owners, and if from any sufficient cause it should be deemed prudent to sell any of the steamers, the net proceeds of such sale, or any money earned, in the shape of freight, will be duly credited in

like proportion. Under this contract the Hansa and the Don, both most excellent boats, now running between Wilmington and the islands, will, on next arriving at the islands, be made over to the state, in the proportion of one-fourth interest in each, and these steamers will be charged, £20,000 sterling for the Hansa and £20,000 sterling for the Don, this being the estimated total
16 cost price of each at the islands, and considerably under the estimated value. Another screw-streamer, similar to the Ceres, will be ready for sea in about four weeks, and in about two months the fourth will be dispatched. By this arrangement the chief objects sought to be obtained are—

"First. To supply railway iron and rolling-stock, and such other articles as may be needed by the state, at a moderate rate of freight, and in regular quantities.

"Second. To run out regularly a quantity of cotton for the state, to enable it to benefit from the very high prices ruling here.

"Third. To reduce the risk of capture as much as possible by dividing the interest of the government over four or more steamers. In order to secure the greater economy, and the more efficient working facilities, the working management of the steamers will rest in the hands of Alex. Collie & Co., who, as representing the larger proportion, will appoint the captains and officers; but no important steps, such as disposing of any of the steamers, or replacing any of them, or adding to their number, will be undertaken without the full knowledge and consent of Mr. White, the special commissioner here. Under this arrangement the parties interested will have the benefit of a well-trained and experienced staff of men, at all points, and the government of the state on its part will give all the aid in its power to the efficient working of the business now inaugurated. It will give all the aid it can do to get transportation of cotton from the interior when required, and it will guarantee the undertaking from any restrictions or impedients being thrown in the way of full cargoes being obtained for each steamer of cotton or other produce with the least possible delay. The inward carrying-power of the steamers from the islands will be at the service of the state, at the rate of £5 per ton, payable at the islands, for railway-iron and rolling-stock, (one-fourth of which will be duly credited to the state as its interest,) and arrangements will be made immediately to lay down 1,000 tons of railway-iron at the islands for this purpose. For fine goods, the rate will be £30 per ton.

"The government of the state will be the owners of outward cargo to the extent of one-fourth. Their cargoes will be purchased by the agents of Alex. Collie & Co., subject to the inspection of the goverment of the state, who will be debited for one-fourth of the amount, and on safe arrival in England one-fourth of the proceeds will be duly credited to the state. The commission chargeable on this business will be the usual one of two and a half per cent. on purchases and realizing, and five per cent. on ships' disbursements, in addition to the

usual brokerage, and such charges as incurred at the islands for transshipment and storing. The government will of course have the option of putting on board their own shares of the cotton, but for many reasons this is hardly desirable. If they do so, however, the buying commission of two and a half per cent. will be avoided. In cases when Alex. Collie & Co. come under cash advances for account of the state, (in place of putting the cotton-warrants in the market,) Alex. Collie & Co. will be entitled to a further commission of two and a half per cent. for the amount of such advance—interest at the rate of five per cent. to be charged, and the same rate to be allowed when there is cash in hand. This agreement to be in force till the steamers are sold, captured, or destroyed.

(Signed) "ALEX. COLLIE.
(Signed) "JOHN WHITE,
"*Commissioner for the State of North Carolina.*

"MANCHESTER, 27*th Oct.*, 1863."

17 In pursuance of this agreement the said Collie sent out to Wilmington, N. C., four steamers loaded with shoes, army clothing, and other supplies, which he bought for account of the State of North Carolina; and he received back cotton from said state, in payment as well for the goods so sent, as for the share of said state in said steamers.

In the year 1863 the said Collie sold in London for the State of North Carolina, obligations of that state, delivered to him for that purpose by the said John White, known as North Carolina cotton-warrants; which were obligations for the delivery of cotton at the port of Wilmington, or at other ports then in possession of the Confederate States; and the said Collie disposed in England of large amounts of said obligations, giving with them his agreement to hold himself personally responsible to the parties to whom he sold them for their payment by the State of North Carolina; and he also took some of said obligations in payment for the goods which he shipped to that state.

On the 13th of June, 1864, the said Collie entered into the following written contract with Colin J. McRae, agent of the government of said Confederate States:

"Memorandum of agreement between Alexander Collie, of London, on the one part, and Colin J. McRae, as representing the government of the Confederate States of America, on the other part.

"1. Alexander Collie agrees to provide four large and powerful new steamers, to carry out the following arrangements, with the least possible delay.

"2. Alexander Collie will at once cause to be purchased, under Colin J. McRae's directions, quartermaster's stores to the value of one hundred and fifty thousand pounds sterling, and ordnance or medical stores to the value of fifty thousand pounds sterling, the

one subject to the inspection of Major J. B. Ferguson, the other to that of Major C. Huse.

"3. The delivery of such purchases to extend over a period of about six months, in proportionate quantities, and shipment to be made to the Confederate States with as little delay thereafter as practicable.

"4. Inland carriage and packing expenses to be charged in the invoice, and 2½ per cent. commission to be chargeable also.

"5. Colin J. McRae, on behalf of his government, agrees that, on arrival in the Confederacy of any goods purchased and shipped by Alexander Collie, under this agreement, such goods will be immediately claimed and taken over by the government. Fifty per cent. advance will be added to the English invoice, and Alexander Collie, through his agent, will immediately receive in exchange, cotton at the rate of 6*d.* (sixpence) sterling per pound.

"6. Such cotton to class 'middling,' and to be delivered alongside the steamers as required; compressed, packed, and in good merchantable condition.

"7. Full cargoes of cotton, received in exchange for goods delivered under this agreement, may be shipped by Alexander Collie, through his agent, free from any other charge or restriction whatever beyond the now-existing export-tax of ⅛ of a cent per pound.

"8. No steamers to have priority in any way over those employed by Alexander Collie, in this service, and more than the four above mentioned may be used, if Alexander Collie can arrange to put them on.

"9. Colin J. McRae further agrees that to cover the expense of Alexander Collie's agencies abroad, he (Alexander Collie) is to have the privilege of providing and bringing out other cotton than that received under this agreement, to the extent of one-tenth part of the cargo-space of the respective steamers, and such cotton (or tobacco) may be shipped on same terms as indicated for government cotton, viz., free from all other charges or restrictions whatsoever, exceptihg the before-named export-duty nowexisting.

18

"10. This agreement is to be construed by both parties in a spirit of confidence and liberality. The one will purchase and send forward the supplies indicated, with the least possible delay; the other will deliver cotton as required, in the same way; and neither party will withhold necessary supplies, on account of any temporary shortcomings on the part of the other.

"11. Alexander Collie's agents, with the necessary staff for attending to this business, are to be allowed the privilege of residing in the Confederacy, free from liability to conscription, and every reasonable facility is to be allowed them for effectually carrying out the terms of this agreement.

(Signed) "ALEX. COLLIE.
"C. J. McRAE,
"*Agent C. S. A.*

"LONDON, 13*th June*, 1864."

Under this contract, in the winter of 1863–'64, and the spring and summer of 1864, divers steamers were supplied, and importations of supplies and munitions of war for the Confederate government were run by them into Wilmington, and return-cargoes of cotton on account of that government and of said Collie, were run by them out of that port to England.

In March, 1864, the said Collie sent, as a present to the Confederate authorities at Wilmington, on one of his steamers engaged in running the blockade into that port, a Whitworth gun for field service, with carriage, caisson, limbers, and all other customary appendages, together with a large quantity of shot of the proper caliber for the gun, in regard to which he wrote to the governor of North Carolina as follows:

"I have shipped on board the Edith a new kind of gun which is reported to be particularly destructive, and I have to ask the authorities at Wilmington to accept it as a 'substitute' for some of our people, who, but for our business, would have been doing business in another capacity."

This gun was received by the Confederate authorities in Wimington and used in defence of that port, and in aiding the entry into it of blockade-running steamers, by repelling the vessels of the United States engaged in pursuing those steamers.

In the year 1864, the said Collie sent on one of his blockade-running vessels to the government of said Confederate States, as a gift from himself, two Whitworth guns, which were received by that government and used in its service.

In the same year the said Collie made a donation to that government of $30,000 to aid the needy and the suffering in the insurgent states, and more particularly those who had been made so through the war.

III. In the years 1862, 1863, and 1864, the said Collie, through an agent in the insurgent states, sent out by him in 1862, purchased with money derived from sales of cargoes run through the blockade into ports in those states, in said Collie's steamers, 3,096 bales of upland cotton, and 1,757 bales of sea-island cotton; all of which was stored in Savannah at the time of the capture of that city by the military forces of the United States in December, 1864, and was there seized and taken by those forces, and thence shipped to New York, where it was sold by an agent of the United States, and the proceeds thereof, amounting to $950,076.71, were paid into the Treasury of the United States.

19 Upon the foregoing facts and those allowed upon the defendants' request, the *conclusion of law* is that the petition of the claimant should be dismissed; and the grounds of that conclusion are set forth in the subjoined opinions.

By the court.

20 XV.—*Opinion of the court by Chief Justice Drake, and concurring opinions by Judges Richardson and Nott.*

DRAKE, *Ch. J.:*

This case was very ably argued on behalf of the claimant as if it were pending before an international tribunal, organized for its decision on the principles and by the rules of public law. Were this court vested with jurisdiction so to decide it, it would be difficult to resist the force of the arguments presented by the claimant's counsel. But in any view I can take of the matter, the court is not authorized to base its decision for or against either party on those principles and rules. We have no jurisdiction except that conferred by statutes of the United States, and public law cannot be held to enlarge the powers so conferred, and much less can it operate to take them away, modify, or limit them.

This action was brought under *the Captured and Abandoned Property Act* of March 12, 1863, and by the terms of that act the claimant's right of recovery must be decided. Aside from that act the claimant would have no possible right to sue in this court, though he could demonstrate that every principle of public law justified his right to seek through his own government the payment to him by the United States of the value of the cotton seized and taken by their military authorities.

The Captured and Abandoned Property Act declared that "any person claiming to have been the owner of any such abandoned or captured property may at any time within two years after the suppression of the rebellion prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of said proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

Within those few lines the claimant must find his right to recover in this case, or not find it at all. If he finds it there he has no need to invoke aid from international law; if he cannot find it there that law cannot aid him.

The petition seeks redress under that act, and is framed to meet the requirements of the twelfth section of the act of March 3, 1863, (12 Stat. L., 765,) which imposes the following limitation:

"*Provided, however*, That in order to authorize the said court to render a judgment in favor of any claimant, if a citizen of the United States, it shall be set forth in the petition that the claimant, and the original and every prior owner thereof where the claim has been assigned, has at all times borne true allegiance to the government of the United States, and, whether a citizen or not, that he

has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, which allegations may be traversed by the government; and if on the trial such issue shall be decided against the claimant, his petition shall be dismissed."

That prescribes a condition precedent to the exercise by this court of its power to render a judgment in favor of any claimant.

This court always after the enactment of that *proviso* enforced
21 its requirement, until the Supreme Court, by its repeated decisions, compelled us to abandon it in every case where the claimant was either a citizen of the United States, or an alien resident within the United States. That court decided that either a special pardon, or the general amnesty of December 25, 1868, obliterated the *offence of treason* involved in giving aid and comfort to the rebellion, so far as persons of either of those descriptions were concerned; and that the *fact* of their having given such aid and comfort was, after pardon or amnesty, no longer an obstacle to their obtaining a judgment in this court. But to this day the question has never been submitted to that court whether an alien residing in a foreign country, who gave aid and comfort to the rebellion, may prosecute a suit here for the proceeds of his property captured in the rebel states during the war.

The petition avers that Alexander Collie had not in any way voluntarily aided, abetted, or given encouragement to rebellion against the government of the United States; and the government took issue upon that averment. The facts found show that he did voluntarily give very great and efficient aid to the rebellion, by running through the blockade into the ports of the rebel states large quantities of munitions of war, and running out from those ports to England large quantities of cotton, which, sold in England, furnished the rebel authorities large credits there; and also by sending presents from himself of cannon and ammunition to the rebel authorities; and also by a gift of $30,000 from himself to those authorities to aid the needy and the suffering in those states, particularly those who had been made so through the war.

And now the question arising on these facts is not whether, under the principles of international law, he has a just claim against the United States for the value of his cotton captured in Savannah, but whether under the act of March 12, 1863, he is authorized to prefer his claim *in this court* for the proceeds of that cotton and obtain a judgment therefor.

It will be instantly observed that by the principles of international law he would be entitled to insist upon restitution of the full value of his cotton; while in this court he can recover only the net proceeds of the sale thereof, after deducting all expenses. If, therefore, he should recover here those proceeds, he might, through his government, still demand the difference between the proceeds and the value of the cotton, with interest on that value from the

date of capture till that of the payment to him, under the judgment of this court, of the proceeds, and interest on the balance until paid. If, however, we deny his right to prefer his claim here, we do not thereby pass upon the merits of his claim; much less would that action operate a forfeiture or confiscation of his property; but it would simply withhold from him one of two modes of redress, leaving the other fully open to him. Most assuredly this government is not bound by international law to furnish him a judicial remedy; and when it does provide, by statute, a court where claims for captured property can be preferred, neither he nor any other person can come into that court for that purpose on any other terms than those the statute prescribes.

The real question in the case, then, is, whether Alexander Collie, a non-resident alien, who voluntarily gave aid and comfort to the rebellion, is entitled to prefer his claim here for the proceeds of his cotton. Beyond doubt the terms of the act exclude him, just as they did all men who had given aid and comfort to the rebellion,
22 until the Supreme Court held that pardon or amnesty obliterated the act of treason as well as its guilt, and so the act could never be set up as a bar to recovery.

Beyond controversy, neither pardon nor amnesty applies to him who has not been guilty of a criminal offence against the sovereign or state.

Equally beyond controversy, Alexander Collie's sending munitions of war from the country of his domicile to the rebel states was not an act which subjected him to punishment under the laws of the United States. The worst that could befall him was the capture *in transitu* of those munitions.

Hence it follows, as a clear, inevitable conclusion, that he was not the subject of amnesty, and, therefore, can claim nothing through it.

As the decisions of the Supreme Court which dispensed with averment and proof of loyalty to the United States did not deny the constitutional right of Congress to require such averment and proof, but merely affirmed that the effect of pardon and amnesty was to do away with the necessity of them, and as Collie was not the subject of amnesty, it follows that there is nothing which does or could relieve him from the obligation to aver and prove, not his allegiance to the government of the United States, which he never owed, but that he "had not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government." He so averred, but failed to sustain the averment by proof. On the contrary, the evidence most completely disproved the averment. Such being the case, no matter how valid and just a claim he may have, in the view of public law, he has no right to invoke the jurisdiction of this court, which can be exercised only in conformity with the statutes conferring its powers.

The claimant's petition, therefore, should be dismissed.

RICHARDSON, *J.*, concurring:

I concur in the opinion read by the Chief Justice, and as I come to the same conclusion by a somewhat different course of reasoning, not presented in the argument, I will state my views.

The organic law establishing this court on its present basis and with its present jurisdiction, the act of March 3, 1863, provided "that in order to authorize the said court to render any judgment in favor of any claimant, if a citizen of the United States, it shall be set forth in the petition that the claimant and the original and every prior owner thereof, where the claim has been assigned, has at all times borne true allegiance to the government of the United States, and whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, which allegation may be traversed by the government, and if on trial such issue shall be decided against the claimant, his petition shall be dismissed."—(12 *Statutes at Large*, 765; *Revised Statutes*, §§ 1072, 1073.)

And the captured and abandoned property act of March 12, 1863, in section 3, giving parties the right to maintain action in this court to recover the proceeds of captured property owned by them, expressly makes the right of recovery to depend, among other things, upon the claimant's proving in each case "that he has never given aid or comfort to the present rebellion."—(12 *Statutes*, 820; *Revised Statutes*, § 1059, clause 4, §§ 1072, 1073.)

These two acts were passed by the same Congress, were pending therein at the same time, both passed the Senate March 2, and the former passed the House on that day and the latter the day
23 following. Both must have been before the President about the same time, although the latter was signed nine days later and eight days after the expiration of that Congress, and it may be noticed in passing, as a historical fact, that it is the only instance found on record wherein the President has signed an act after the term of the Congress which passed it had come to an end.

In both acts the provisions which I have cited are substantially and practically the same. In the captured and abandoned property act, the requirement as to alleging and proving that the claimant had borne true allegiance, set forth in the organic law, is not repeated, and the right therein given to parties to recover the proceeds of property captured is accorded to all who could prove that they had not given aid or comfort to the then present rebellion, instead of rebellion in general, as in the former act. This last difference was immaterial, because the act of March 12 was temporary and related only to matters connected with the late rebellion, while that of March 3 was permanent and more general in its scope and provisions. The Supreme Court has decided that whatever new subjects of jurisdiction are conferred upon this court, the cases are to be heard and determined under the existing organization, and that the

provisions of the act of March 3 apply to actions brought under the captured and abandoned property act, even that giving a right of appeal to the Supreme Court, which is not specified in the latter act.—(*Zellner* vs. *The United States*, 9 *Wall.*, 244; 7 *C. C. R.*, 137.)

These two acts, thus passed at the same time, must be examined together when we come to consider the intention of Congress in enacting the provisions to which I have referred and which I have cited above.

These provisions relate exclusively to the proceedings to be had in this court, to the remedy given by statute, and it is laid down in *Watlake on Private International Law*, (art. 170, p. 158,) that "the laws which prescribe the modes of judicial procedure are commands addressed, not to the party, but to the judge; whence it follows that the latter is bound by those of the sovereign from whom he holds his commission, and that no circumstances can found for the parties a right to have the proceedings determined by any other will than the *lex fori*." This principle of law is so familiar that it needed no citation of authority to support it, but, although universally acknowledged, it is so important not to lose sight of it in the consideration of this case, that it is thus referred to in the language of an English author.

The original claimant, Alexander Collie, now represented here by his assignee in bankruptcy, sets forth in his petition "that he has at all times borne true allegiance to the government of the United States, and that he has not, in any way, voluntarily aided, abetted, or given encouragement to the rebellion against the said government," adopting nearly the language of the organic act of March 3, 1863, and the petition was duly sworn to by his agent as true, according to his belief, as required by the terms of said act. This, among other allegations, was traversed by the defendants and issue was joined thereon.

The facts found by the court conclusively show that Mr. Collie did voluntarily aid, abet, and give encouragement to the late rebellion against the government of the United States, systematically, continually, and extensively during nearly the whole period of hostilities, and so much was he engaged in trading with the citizens of the revolted states and furnishing them with supplies, purchasing cotton in return, and transporting the one and the other to and from the hostile territory through the blockaded ports, that, as the claimant's counsel stated in his argument, and as may readily
24 be inferred from the facts found by the court, his name became synonymous with "blockade-runner," and wherever that name occurred in any matter the government officials always knew that the transaction was connected with blockade-running.

He did more; he entered into co-partnership in some of his business with one of the revolted states and with the government of the Confederate States, and shipped through the blockaded ports munitions of war, arms, gunpowder, armor-plates, cannon, shot, and

other like articles; he made presents of three guns for field-service to that government, and otherwise aided, abetted, and encouraged the rebellion in the manner set forth in the findings.

The claimant's counsel, while conceding that the acts done by Collie were such as would require the court to dismiss his petition if he were a citizen of the United States or resident alien, unpardoned, maintain that as he was a non-resident alien, a subject of Great Britain, who had never been in this country and so owed to it no allegiance, all his acts were such as he had a right to do by the law of nations, that he committed no offense and was liable to no punishment under the laws of the United States or Great Britain, and that although his case would seem to be within the strict language of the provisions of the acts which I have cited, it could never have been intended by Congress to exclude non-resident aliens, who had committed no crime or offense, from the privilege of bringing action in this court for doing what, by the law of nations, they had a perfect right to do. And they seek to have the provisions referred to so construed as to include only such unlawful aid, comfort, and encouragement to rebellion as would amount to crimes and offenses punishable under the laws of one country or the other. The case, then, turns upon the intention of Congress as expressed in these provisions.

We have listened to able, learned, exhaustive, and instructive arguments by the distinguished counsel who have represented the claimant's case with great power, industry, and ingenuity to prove that the acts of Collie were not crimes or offenses, and were not forbidden by the rules of modern warfare nor by the law of nations.

If the acts of March, 1863, had been passed in time of profound peace, and Congress were then engaged in making comprehensive provisions for the determination and settlement of claims against the United States by aliens and others, or were enacting a code of punishments, penalties, and forfeitures for offenses against the state in time of war, the arguments, citations, and illustrations by claimant's counsel would have a powerful application, and I cannot say that they would not conclusively prove the correctness of the position which has been taken by them.

But in passing the act of March 3, and in enacting the provisions in the act of March 12, 1863, authorizing suits to be brought in this court to recover the proceeds of captured and abandoned property paid into the public treasury, Congress was dealing with *privileges* to be granted, and not with crimes and offenses to be punished. To allow suits to be brought and judgments obtained against the government in any form, to any extent whatever, and by any parties as a matter of right, was then an untried and novel undertaking.

Until the year 1855, no provisions had ever been made since the adoption of the Constitution for the investigation of claims against the United States, outside of Congress and the departments. This court was then established with extremely limited powers. Parties

might petition the court and have their claim examined and reported upon to Congress for its action thereon, and that was the extent of the privileges conferred by the act of February 24, 1855.—(10 *Statutes*, 612.)

25 That a State cannot be sued without its consent is a well established principle. In the case of *De Groot* vs. *The United States*, (5 Wall., 431,) Mr. Justice Miller thus refers to that subject in connection with this court:

"The government of the United States cannot be sued for a claim or demand against it without its consent. This rule is carried so far by this court that it has been held that when the United States is plaintiff in one of the federal courts, and the defendant has pleaded a set-off which the acts of Congress have authorized him to rely on, no judgment can be rendered against the government, although it may be judicially ascertained that on striking a balance of just demands the government is indebted to the defendant in an ascertained amount. And if the United States shall sue an individual in any of her courts, and fail to establish a claim, no judgment can be rendered for the costs expended by the defendant in his defense. If, therefore, the Court of Claims has the right to entertain jurisdiction of cases in which the United States is defendant, and to render judgment against the defendant, it is only by virtue of acts of Congress granting such jurisdiction, and it is limited precisely to such cases, both in regard to parties and to the cause of action, as Congress has prescribed."

And in *Ex-parte Russell*, (13 Wall., 668,) Mr. Justice Bradley says: "The erection of the Court of Claims itself, and the giving to parties the privilege of suing the government therein, though dictated by a sense of justice and good faith, were purely voluntary on the part of Congress; and it has the right to impose such conditions and regulations in reference to the proceedings in that court as it sees fit."

By the two acts of March, 1863, Congress did grant its consent to have judgment rendered against it in this court, and in language which seems clear enough when taken by itself did describe the parties upon whom it conferred its privileges. If it did not mean what the full force of the words imply, but intended to exclude from the privileges only those who had so aided the rebellion as to have committed crimes or offenses thereby, and did intend to grant the privilege of maintaining actions in this court to non-resident aliens, who, although they may have done the acts described, had committed no offense against the law of nations, that intention must be gathered from the acts themselves, read and construed by the light of the times and circumstances in which they were passed, the prevailing sentiment of Congress and of the country, as well as the then-existing condition and progress of that great rebellion, in the midst of which, with the future all uncertain, the nation was struggling for self-preservation, and the efforts on the one side to suppress and

on the other to maintain it. By such light only can we read the intention of Congress as expressed in its well-chosen words.

In the winter of 1862–'63, when Congress was considering the matters incorporated into the acts of March, 1863, the internal resources of the seceded states had become greatly exhausted, and the hope of holding out until the Union cause should be abandoned, and of the final success and triumph of their own cause rested to a great extent, if not mainly, as perhaps it had from the beginning, upon their foreign commerce, by which their cotton, their principal reliance for obtaining means to carry on the war, was sent to market, through merchants at home and abroad, and supplies for their armies and their people procured in return. Emissaries and agents were dispatched to foreign countries, and especially to England, to forward that object. The extensive commercial house of Trenholm & Co., of Charleston, S. C., had established a branch house at Liverpool, and one of their members became a naturalized citizen of
26 Great Britain, and Trenholm was made secretary of the treasury of the Confederacy. This house in Liverpool was a depositary of the public money of the rebel organization, and through it, in the apt language of the presentation of the case of the United States before the Geneva Commissioners, "There was early established in Great Britain a branch of the war department of the insurgents, a branch of their navy department, and a branch of their treasury, each with almost plenary powers." By means of foreign commerce and foreign loans this branch of their treasury was supplied with funds. Contracts were entered into in England for building steamers for the Confederate States, six iron-clads having been contracted for there in August, 1862, and other vessels were built for the insurgents at other times and places. Blockade-running by the subjects of Great Britain was encouraged and promoted, and a large commerce sprang up between England and the rebel states, carried on, to a great extent, by transshipments at Nassau, Bermuda, and other British ports, by means of which the power of the rebellion was increased, and the ability of the insurgents to carry on war was enlarged.

In August, 1862, there was established in London a "Confederate States Aid Association," whose object was to appropriate all money received toward "purchasing and forwarding to the Confederate States of America the materials which, in the judgment of the association, shall be considered the best calculated to enable them to carry on the war, and to bring their present protracted struggle to a successful issue."—(*Diplomatic Correspondence*, 1863, *part* 1, *p.* 19.)

In December, 1862, Mr. Adams, our minister to the court of St. James, in one of his dispatches to the Secretary of State, after referring to the appearance of a softening in the tone of public sentiment towards the United States, adds:

"The great obstacle in the way of the better understanding which would naturally follow from this state of things is to be found in the movements going on in this kingdom, under strong appeals making to the avarice of the commercial interest by the desperate insurgents. There is scarcely a limit to the extent of the offers made to secure assistance. Much of the evidence upon which I make this statement has already been laid before you from other quarters. It appears that a loan, to a large amount, has been effected on the security of cotton, to be furnished at a price which would secure an enormous profit to the holders, and that a corresponding rate of gain has been held out for the delivery of goods of which the rebels now stand in the most absolute need. This discovery furnishes at last an explanation of the sources of the large sums of money which have been lavished at a most reckless rate in the purchase and construction of steamers of all kinds and munitions of war, in the dispatch of military adventurers from the continent, and in the purchase of every variety of article that is needed to supply existing domestic wants in those states. The ports of Liverpool and London are filled with vessels taking in commodities destined for the insurgents. At the same time a strong interest is thus formed which must be brought to bear more or less forcibly on the policy of the government toward the United States."—(*Diplomatic Correspondence*, 1863, *part* 1, *p.* 15.)

The efforts of the United States government were put forth in every possible direction within its power to cripple, curtail, or stop this material aid and comfort which the insurgents were receiving from abroad, and especially from England. The ports of the rebel states were blockaded, as far as the magnitude of the undertaking would admit, remonstrances were made to the British gov-
27 ernment, and nothing was omitted to be done in that direction that could be made available for the purpose. Public feeling was excited, and it was at that time by no means certain that the foreign relations of the United States, through the very transactions in which the claimant was taking an active and important part, might not involve the country in a war with one or more of the foreign powers before the rebellion could be suppressed. It is not necessary to go further into the history of those days, when the Union was in the midst of a great struggle to preserve its existence.

These events have thus been referred to to a very limited extent merely for the purpose of recalling to mind, in discussing the questions now under consideration, the sentiment which was prominent and, next to maintaining the armies in the field, predominant in Congress when the acts of March, 1863, were passed. Those events are of too recent date, and have been too extensively discussed in diplomatic correspondence, in Congress, and in the public press, to require more than a passing mention. They were then, and are still, as familiar almost as household words.

It will be seen and remembered, I think, that Congress was not in a condition of sentiment or disposition to accord to non-resident aliens who were engaged in giving aid, comfort, and encouragement to the rebellion any rights not guaranteed to them by the law of nations, nor to grant to them any new privileges from which it excluded our own citizens for doing the same kind of acts.

In my opinion, it was the well-considered and well-understood intention, as it was the clearly-expressed language and the undoubted right of Congress not to confer the privilege of maintaining actions in this court upon unfriendly non-resident foreigners engaged in blockade-running, in building vessels for the rebel government, in furnishing money and means, by loan or otherwise, and generally in aiding, with material assistance, the insurgents to continue active hostilities against the United States and to prolong the rebellion, which had even then reached a great magnitude, endangered the Union, and subjected the country to immense losses in human life and treasure.

And this was not because Congress desired or intended to confiscate any property of non-resident aliens, or to deny to them any reasonable and just rights and privileges, or to discriminate against them in an unfriendly spirit, but because the matters involved were connected with important diplomatic questions and principles of international law affecting our foreign relations, which Congress was not at that time prepared to submit in whole or in part, directly or indirectly, to the determination of this or any other court of law, but which it chose to reserve for future arrangement and settlement in the usual manner, by treaty stipulations, which might at the same time cover all the controversies growing out of the then-existing rebellion which had unhappily sprung up between this country and the European nation principally concerned therein, as it left the case of citizens and those owing allegiance, who had given aid and comfort to the enemy, to the future consideration and determination of the President, in the exercise of his constitutional power of pardon.

And most magnanimously and honorably have those powers been exercised since the termination of the rebellion; as to citizens, by the proclamation of pardon and amnesty, (15 *Statutes*, 711,) and as to non-resident aliens, subjects of Great Britain, by the great treaty of Washington, entered into and established as basis of settlement of all the numerous controversies between the high contracting parties, (17 *Statutes*, 863,) a treaty which will forever stand as a monument of the peaceful settlement of international controversies
28 by arbitration to an extent never before attempted, reflecting credit upon both nations as well as on all parties engaged in originating, framing, and executing it.

This treaty provided, in Article XII., (15 *Statutes*, 867,) for the settlement of just such claims as that of the present claimant, and he presented his case to the commissioners appointed under that article. By them his petition was dismissed because he had brought

his action in this court and submitted the same claim to the jurisdiction of this tribunal, and it has been suggested as a hardship that he should be turned away from each tribunal on the ground that the other alone had jurisdiction of the case. I think the facts do not warrant the suggestion. Mr. Collie, at the close of the rebellion, when his occupation was gone, instead of waiting, as did others in like circumstances, for the government of his own country, to which he owed allegiance, to enter into treaty arrangements for the settlement of such cases, made haste to avail himself of the limited privileges accorded by the jurisdiction of this court and presented his case here with such allegations, under oath, as clearly brought him within the terms of that jurisdiction. Because he had submitted his claim to this court, the commissioners, under the twelfth article of the treaty, held him to his election, and refused to take the case away from that tribunal of his first choice, (*Robert S. Hale's Report to Secretary of State*, 47, 207,) and this court now dismisses his petition, not for want of jurisdiction, but because the issue is found against him on the facts alleged by himself. Had he proved here the allegations of his petition, he would have a good cause of action and would be entitled to judgment in his favor, and if he relied upon proving facts which his evidence would not support, this was his own fault or his misfortune.

I have said that Congress was not willing at the time of the passage of the act of March 3, 1863, to submit controversies and questions of international law in general to the determination of this or any other court of law, and that is apparent from the ninth section of the act, (*now Revised Statutes*, § 1066,) wherein it is provided "that the jurisdiction of said court shall not extend to or include any claim against the government not pending in said court on the first day of December, 1862, growing out of or dependent on any treaty stipulation entered into with foreign nations or with Indian tribes." The settlement of that class of cases, as of this to which the claimant's case belong, Congress reserved for the diplomatic branch of the government.

The claimant's counsel rely much upon the decision and opinion of the Supreme Court in the case of *Murry* vs. *Schooner Charming Betsey*, (2 Cranch, 64,) in which Chief-Justice Marshall recognized as a correct principle, "that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights or to affect neutral commerce, further than is warranted by the law of nations as understood in this country."

That case arose under the act of February 27, 1800, (2 *Statutes*, 7,) "to suspend the commercial intercourse between the United States and France and the dependencies thereof," and was for the condemnation of the schooner captured as a prize for violation of that act. The owner set up that he was a Danish subject and not a citizen of the United States, and claimed the protection due to

him by the law of nations. It appeared that said owner, although born in the United States, had removed to the island of St. Thomas while an infant; that he carried on trade, married a wife, and acquired real property on the island, and had taken the oath of allegiance to the crown of Denmark. The court held
29 that he had made himself the subject of a foreign power, put himself out of the protection of the United States, and was not a citizen within the meaning of the act so as to subject his schooner to capture as prize for violation of its provision.

But in the case now under consideration, the present claimant does not set up any *rights* to which he is entitled by the law of nations; and the acts of March, 1863, construed as I interpret them, violate neither that law nor the rights of neutrals, nor interfere with or affect neutral commerce in any particular. It was strictly within the right, as it was within the power, of Congress to grant or withhold the privilege of suing in any of the courts of its own creation to and from such persons and for such causes of action and upon such allegations and proofs as, in its wisdom, it saw fit to prescribe.

The claimant, instead of demanding *rights* under international law, comes here seeking *privileges* under the local laws of that country whose government, policy, and efforts at self-preservation in time of peril, the facts show he did his utmost to cripple, injure, and destroy, and by that law his case must be tried and determined.

It has been strenuously maintained that there is a distinction, in the same case and as to the same party, in fact and in law, between the crime or offense and the act of aiding, abetting, and giving comfort or encouragement to rebellion which the Supreme Court has recognized, (*Bond's Case*, 2 C. Cl. R., 629; *Pargoud's Case*, 4 C. Cl. R., 337; *Withowski's Case*, 7 C. Cl. R., 398; *Green's Case*, 8 C. Cl. R., 420; *Collie's Case*, 9 C. Cl. R., 431;) and that it having been decided by that court that pardon relieves citizens and subjects, including resident aliens owing a temporary allegiance to the government, from the disabilities imposed by the words to which I have referred to maintain actions in this court, (*Klein's Case*, 13 Wall., 128; *Armstrong's Case*, 13 Wall., 154; *Carlisle's Case*, 16 Wall., 147; *Pargoud's Case*, 7 C. Cl. R., 289; *see also ex-parte Garland*, 4 Wall., 333,) and as pardon can afford relief only in cases of crimes and offenses, therefore it necessarily follows that it was the crime or offense only of aiding and giving comfort to the rebellion that was referred to by Congress, and that it still further follows that as non-resident aliens cannot commit the crime or offense of treason against this government, therefore they are not included within the class of persons to whom the words in question apply. It was upon this ground that the claimant recovered judgment in his favor upon a former trial of this case.—(9 *C. Cl. R.*, 431)

I do not concur in the proposition that any such distinction between the act and the crime, when the act constitutes a crime, was

intended by Congress in the statutes referred to, or exists in law; and, in my opinion, it is not supported by the decisions of the Supreme Court which have been relied on, nor by any language used by the judges in their opinions, and is not warranted by the words employed, as construed by the ordinary rules of construction or interpreted by the light of the times in which they were introduced into the statutes, as I have before pointed out, and therefore I cannot concur in the deductions and conclusions which have been drawn therefrom by counsel and others.

In my view it was because the Supreme Court found that there was *no distinction* between the act and the offense in the case of citizens and persons owing allegiance, temporary or otherwise, that it was held that pardon removed the disability. The words "aid and comfort" and "aided, abetted, or given encouragement" to rebellion, when applied to such persons, as clearly and accurately describe a crime or offense as if the word treason had been
30 used. The act is the offense. They are one and inseparable, the same in law and in fact, and I think were so regarded by the Supreme Court when it was decided that when the crime was pardoned everything done within any meaning of the words in question was also pardoned, and all disabilities arising therefrom were blotted out.

Treason is defined by the Constitution to "consist of levying war against them [the United States] or in adhering to their enemies, giving them aid or comfort," and Congress is invested with the power to declare the punishment of treason, under certain limitations.—(*Constiuttion, Art.* 3, § 3.) To the President is given the power of pardon, (*Constitution, Art.* 2, § 2,) and that power is commensurate with the right in Congress to declare punishments. By whatever words Congress describes treason or any other offense, and attaches thereto a punishment, in whatever form, either by imprisonment or fine, by political disabilities or civil disabilities of extensive application, or simply by disabilities to sue in this or any other court, the President's power of pardon extends to and reaches it, and by his constitutional prerogative he may remove the same in any case according to his own will and pleasure, and that prerogative cannot be avoided by any attempt to make a distinction where none exists in law, and to attach disabilities to the act and not to the offense.—(*Klein's Case*, 13 Wall., 128.)

Congress thus having attached to the act of aiding, abetting, or giving encouragement to rebellion a disability to maintain actions in this court, that disability, whenever it applies to a person owing allegiance to the government, may be pardoned by the President, and such pardon obliterates the whole penalty, whether for the act or the crime, for they cannot be separated. Congress in describing the act described the crime, and the President in pardoning the crime pardons all the legal consequences of the acts which constitute the crime.

Such, in my opinion, is the true meaning, force, and effect of the decisions of the Supreme Court.

To every human act consequences are attached by the laws of nature which no executive pardon can reach and which no human power can obliterate, while to the same act the laws of man may decree other consequences, which, except where already accomplished, the power creating may destroy, obliterate, modify, and prevent, by pardon or otherwise; and in that sense, and no other, according to my view, can a distinction be drawn, as is attempted, between the act and the crime, when the act constitutes a crime.

When Congress created the disability in question as to persons who gave "aid and comfort to the rebellion," or who had "voluntarily aided, abetted, or given encouragement to rebellion against the said government," it intended, in my opinion, to use those words in their usual, natural, and plain signification, without exception and without the subtle distinction invented by the ingenuity of learned counsel, by which they would apply to the offense as distinguished from the act, and that Congress did this with a full and clear understanding that parties could have such disability removed or modified, each according to his legal status, the citizen and resident alien by pardon, and the non-resident alien through his own government by treaty stipulations or diplomatic negotiations.

It seems to me that Congress introduced the words in the act of March 3, "if a citizen," of whom it was required that he should prove that he had "at all times borne true allegiance to the government of the United States," and the words "whether a citizen or not" in the subsequent provision requiring such person to
31 prove that "he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government," and carefully omitted the word "treason" from that act and the captured and abandoned property act for the very purpose of making sure, by words whose meaning could not be mistaken, of reaching persons whose acts would not be crimes punishable under any law whatever.

Disabilities to maintain actions in courts of law not arising from crimes or offenses are familiar to every lawyer.—(*R. S.*, § 1069.) Those aliens who are citizens or subjects of a government which accords to citizens of the United States the right to prosecute claims against such government in its own courts are the only aliens who, under any circumstances, have the privilege of prosecuting claims in this court.—(*R. S.*, § 1068; *United States* vs. *O'Keefe*, 11 *Wall.*, 178.)

To exclude parties from the privilege of bringing actions in the courts of a state by reason of, and in matters connected with, acts done by them in other states, not in violation of any law to which they are amenable criminally, but which the state wherein such courts are established deems injurious to its interests and against its determined policy, and which would be offenses if done in that state, is

no novel proceeding, and has never been deemed a breach of that comity due from one state to another. Massachusetts long ago provided that "no action of any kind shall be had or maintained in any court for the price of any liquor sold in any other state for the purpose of being brought into this commonwealth to be kept or sold in violation of law under such circumstances that the vendor would have reasonable cause to believe the purchaser entertained such illegal purpose."—(*General Statutes of Mass.*, ch. 86, § 61.)

Maine enacted a similar law.—(*R. S. of Maine*, § 50, p. 309; *Meservey's case*, 55 Maine, 540.)

Even independently of statute prohibitions the courts of a state do not afford remedies to parties engaged in other states and countries in transactions legally carried on there with the intention and for the purpose of assisting in the violation of laws of the state in which the aid of the courts is invoked.—(*Webster* vs. *Menger*, 8 Gray, 587; *Territt* vs. *Bartlett*, 21 Vermont, 184.) And I apprehend that, by the common law, no action could be maintained in this country for freight earned by neutral vessels in the transportation and delivery of goods to persons in the rebel states through the blockaded ports during the rebellion, under whatever flag and from whatever country such vessels sailed, nor for the price of goods so delivered. (*Story on Conflict of Laws*, § 259[3].) The cases, I know, differ from the one now at bar, because Congress may authorize actions to he brought against individuals or against the government in whatever cases it sees fit to grant the privilege; and we are now dealing with statute law, and the question here is whether or not the privilege has been granted to the claimant to maintain this action under the statute which this court is administering. But they go far to show that to exclude aliens or non-residents from our courts for engaging in transactions in other countries against the laws, contrary to the policy and detrimental to the safety and well-being of this country, especially in matters growing out of those very transactions, and in suits against the state itself, is no breach of international law or the comity of nations.

That the word "citizen," in the act of March 3, 1863, was intended to include resident aliens is no longer an open question. We know that in popular language it is not always restricted in meaning to a subject of the nation owing full allegiance; and in
32 *Field* vs. *Adren* (7 Md., 209) it was held that "a party may not be a citizen for political purposes, and yet may be a citizen for commercial or business purposes." And Huberus lays it down as an axiom, that "all persons found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof," (*Huberas, lib.* 1, *tit.* 3, *de conflictu legum*, § 2, p. 538; *Story on Conflict of Laws*, §§ 29, 541,) and in the same sense that they are subjects they are also citizens.

The Supreme Court has authoritatively decided that resident aliens in the territory of the insurgents committed an offense by giving aid

and comfort to the rebellion, which could be pardoned by the President, and this could be so only by reason of their being in a restricted sense subjects and citizens.—(*Carlisle's case*, 16 Wall., 147.)

That decision confirms my opinion that the Supreme Court did not recognize the distinction attempted to be maintained between the act and the crime, when the act constitutes the crime, nor hold that Congress intended to refer to the latter and not to the former in denying the privilege of this court to certain parties for acts done by them, because if that had been the view of the judges they could, much more readily and easily, have disposed of Carlisle's case, since the statute thus construed, if the claimants had committed no offense, did not apply to them, and if they had committed an offense the President's pardon relieved them therefrom, and there would have been nothing in the case which required the learned opinion which was delivered, devoted as it is to showing that the claimants, resident aliens, had committed an offense by giving aid and comfort to the rebellion, which was pardonable and pardoned, and for that reason they were not barred from a right to recover judgment in this court. The implication is strong and clear that if the acts of aid and comfort given in their case had been held not to constitute offenses, by reason of the alienage of the claimants, judgment would have been rendered against them, and that could have been only upon the ground that statute of disability referred to the acts of giving aid and comfort to rebellion, whether constituting
33 offenses or not.

In the views which I have taken of the subject here discussed, the opinions of the Supreme Court are clear, consistent, and hormonious, and unmistakably indicate the rules which ought to govern in the decision of the present case.

For these reasons I concur in the judgment dismissing the claimant's petition.

NOTT, *J.*, delivered the following opinion:

The masterly arguments of the counsel for the claimant—arguments which, so far as my personal experience goes, have never been surpassed in this court in power and legal analysis and comprehensive learning—placed the right of the claimant to recover here on his rights as a neutral subject, standing upon the general principles of international law. I am aware that justice cannot be done to the legal positions of the argument when reducing them to a single sentence, yet for the purposes of this inquiry I shall endeavor to state them as accurately as may be in the following propositions:

The right of the claimant as a foreign neutral to acquire this property, and the right of the United States to appropriate it by capture or confiscation, are questions of public and not of municipal law; the purpose of the statute was to make all claims upon the fund a subject for judicial and not for diplomatic redress; and when

a government furnishes a judicial tribunal for claims growing out of its belligerent acts, the subject of another government must exhaust the remedy thus afforded before he can ask the interposition of his own sovereign; and hence this statute becomes a matter of public law, and the case is to be adjudicated by the courts of the United States precisely as it would be by the courts of another country, the law to be administered being, in the words of Lord Stowell, "universal," "and the seat of judicial authority locally here."—(*The Maria*, 1 Rob. Ad. R., 350.)

This last proposition I deem to be the key of the entire case; if the law to be administered here is to be administered precisely as it would be by the courts of another country, I am fully convinced that the claimant is entitled to judgment.

But let it be borne in mind that in the late civil war the United States possessed the dual character of a belligerent conceding belligerent rights, and of a sovereign striving to establish its own authority in its own insurgent territory, jealously reserving the right to punish the offenses against its sovereignty by penalties, forfeitures, and confiscations whenever its authority should be re-established, and publicly proclaiming its intent so to do by statutes and proclamations and in every conceivable manner. Let it also be borne in mind that this property of the claimant, lawfully purchased, as he asserts, was never carried through the blockade to neutral territory, but was allowed voluntarily, after purchase from insurgent citizens of the United States, to remain on American territory until the authority of the United States was re-established by force of arms.

Conceding that in a civil war a neutral may trade with either; that he may buy and carry away property which will be liable only to the risks of capture in passing through a blockade, does it follow that a neutral may come upon insurgent territory and buy property liable to confiscation and evade the risks of carrying it away leaving it in the insurgent territory until the termination of hostilities, and then set up his own title thus acquired, and insist as a neutral that, having had the right to trade by the law of nations,

34 all property so acquired must remain exempt from forfeiture by operation of the municipal law after the municipal law has been re-established by the *de jure* government? Conceding that if a neutral bought and carried his purchase to neutral territory, the legality of his title could not be questioned in the courts of the United States on the ground that it was acquired against their municipal law or their public policy, does it follow that a neutral could have gone into our insurrectionary districts and bought property, real or personal, (liable in the hands of the vendor to ultimate confiscation,) and after its capture on land or seizure for forfeiture at the termination of hostilities that he could have come in through his own government and set up his title as neutral to defeat the lawful government's right of confiscation? In a word, could non-resident aliens, owing no allegiance to this government,

by simply passing through the blockade, have put themselves in a position where they could have bought, without limit, property of the insurgents which the United States would otherwise have been authorized to capture or confiscate, but which they would be debarred from capturing or confiscating without compensation in the hands of a neutral who thus acquired it because on well-settled principles of international law neutrals may trade with belligerents? And if the United States had seized such property so acquired by civil process as they have done by force of arms, would the government of the neutral be warranted in interposing and insisting on compensation for the property thus seized and forfeited?

In the cases of ordinary belligerency, where two independent nations are carrying on hostilities, it is manifestly immaterial whether property acquired through the blockade of the one be left on the territory of the other, or carried to neutral territory; for when peace returns the purchaser will stand on the same friendly territory that he stood upon when he acquired his title. But in the case of civil wars there is always behind the matter of neutrals' right of traffic the offended majesty of the *de jure* government. No nation that I am aware of has ever conceded to aliens in time of war or in time of peace the right to evade its laws or civil policy, and no nation, I apprehend, consistently with the preservation of its own integrity, can ever concede to neutral powers its liability in such a case, or even surrender such a liability to arbitration. The rule in cases of civil war which will concede to neutrals their rights of belligerent traffic, and to governments their right of maintaining the integrity of their nationality will be found, I apprehend, to be this: If the property acquired through the blockade of the government *de jure* be carried successfully to neutral territory, it will cease to be delinquent, and the alien's title thereto will be upheld in all courts, including those of the *de jure* government; but if, on the contrary, the property be left upon insurgent territory until the restoration of that government's authority, it will be subject to its disposal to the same extent as the like property of its insurgent citizens, and may be admistered according to the provisions of its municipal law.

I am, therefore, of the opinion that this court must deal with this case in its ordinary character of a court of the United States administering municipal law, as distinct from the assumed character of a prize court or international tribunal administering public law. In accordance with this conclusion, I now proceed to examine the only matter which, in my opinion, can afford a ground of defense to the present suit.

On the former trial of this case I expressed the opinion that, apart from the terms of the statute, and apart from the aid or com-
35 fort given by the claimant to the rebellion, the title to this cotton having been acquired by a non-resident alien in a blockaded port against public policy, the claimant was in the plight of a smuggler; and that, the forbidden traffic having failed to reach

a result, courts of the United States would not aid him to obtain the proceeds of property acquired against the declared and well-understood public policy of the United States.—(9 C. Cls. R., 455.) At that time the subject was a new one, which had not been presented by the counsel for the government, and two doubts arose in my mind respecting the applicability of the doctrine to the case. The rule in such cases is well settled that where the party has acquired the fruit of his forbidden traffic, the courts of the country will not disturb him in his possession; and it was certainly a question where chattels personal had been bought and reduced to possession whether the eyes of a court would be open to see the illegal title by which they were acquired. But the Supreme Court subsequently, in *Sprott's Case*, (10 C. Cls. R., 1,) resolved this doubt by deciding in favor of the applicability of the doctrine, and still more pointedly in *Whitfield's Case* (10 C. Cls. R., 460) said that the courts of the United States will not assist a claimant "to enforce a right growing out of a contract" "tainted with the vice of the rebellion."

A second doubt has been revived by the able argument on the present trial concerning the rights and liabilities of neutrals, though not directed to the point now under consideration. It may be thought that the only effect of belligerent acts by a neutral are belligerent effects, and that the municipal law of the offended belligerent knows them not. And this is undoubtedly true so far as the person of the neutral is concerned. The municipal law cannot punish him. When the war ends he resumes all the international rights which he ever possessed, and is entitled to all the privileges and remedies which the municipal law or international comity or treaty stipulations accord to those of his fellow-subjects who never violated the strictest obligations of neutrality. As was said by a late eminent and now lamented lawyer* in his argument in the case of *Carlisle & Henderson* (8 C. Cls., 156) in the Supreme Court, "Peace is amnesty as to aliens." A question therefore fairly arises whether the public policy of a country which its courts enforce against aliens exterritorially innocent of violating its municipal law embraces a belligerent policy of a past war, or whether such a policy dies with the war and becomes an exception to the general rule.

Therefore, since the argument, I have given a careful, though brief examination to the subject, and am satisfied, though I confess there is a singular dearth of authorities directly upon the point in the reports, that the war policy of a country, when properly declared by statutes and formal proclamations, is equally to be maintained by courts.

The maxim is, *Ex turpi causa, non oritur actio*, and the principle is that the courts of a country will not aid a foreigner to accomplish that which the laws or policy of the country forbid to its own

*James M. Carlisle, Esq., who, long the leader of the Washington bar, died May 19, 1877.

citizens. No nation is bound to recognize a contract which is injurious to its own interest.—(Story, Conft. Laws, § 244.) And "the laws of every state affect and bind directly all property, whether real or personal, within its territory," "and also all contracts made and acts done within it," (*id.*, § 18,) and every nation has an exclusive right to regulate things within its own territory according to its own public policy.—(*Id.*, § 22.) Contracts which are in evasion of the laws of a country, or of the duties of its
36 citizens, which are against public right or opposed to national policy, are to be deemed nullities in the country affected by these considerations.—(*Id.*, § 244.)

These general principles make no exception of the kind or nature of the policy which is to be respected or upheld by the courts of the country. Nor is it necessary that it should be a policy declared by positive law. Statutes and proclamations are in this regard only indicative of national policy, and courts (as in Sprott's Case) will declare and maintain a public policy, though there be no express statute covering an exceptional transaction. With regard to the war policy of a nation, the clearest declaration of it which I have been able to find is in a very learned and able, though little used book, (1 Bell's Commentaries on Laws Scotland, p. 31,) and is in these words:

"*Contracts against war policy.*—The general principle which regulates this department of law is that war is the operation of the governing powers of the state, aiming at the attainment of national good or the avoidance of national evil; and by the infliction of such inconvenience and distress on the enemy as may induce them to grant the terms of peace for which it is thought expedient to insist. It implies that individuals (who are necessarily without the information which directs the policy of the state) shall not be permitted to interfere. And the rule is that there is not a war for arms and a peace for commerce. It is a necessary consequence of this, that no contract entered into against the war policy can receive effect in a court of law."

Notwithstanding the notable rarity of cases where courts have asserted a war policy after a war has passed, there is one decision which I think directly in point and invested with decisive authority in being a decision of the Supreme Court. The case is all the more authoritative as involving an exceedingly rigorous application of the war policy against an alien plaintiff who personally was innocent of an attempt to violate it; and the application moreover was against all moral considerations, and unhappily favorable to a party who on neither moral nor equitable considerations was entitled to favor or assistance from a court. This case is *Hannay* v. *Eve*, (3 Cr. R., 242,) and the facts were these:

During the war of the Revolution, Congress, by their resolve 9th December, 1781, declared, in retaliation, that all British vessels which should be seized by their crews and brought into an American

port "should be deemed and adjudged as lawful prize to the captors." A British vessel bound to New York (then in possession of the king's forces) being unable to make that port and in danger of foundering, the captain proposed to the crew that they should seize and carry her into an American port, it being first agreed between them that a large proportion of the prize-money should be awarded to him for the benefit of the owners. This plan was carried through, the crew standing fast by their agreement, and the captain receiving a large proportion of the prize-money which would not otherwise have been awarded to him. After the war the owners came to this country and filed a bill against the captain to compel restitution of the money so received. The case came to the Supreme Court, and Chief-Justice Marshall said of it: "The agreement to save the ship and cargo under the semblance of a condemnation was not an immoral act; it was, as has been truly said, a *stratagem* which the laws of war would authorize; but it was certainly a fraud upon the resolution of Congress, and no principle can be more clear than that the courts of the United States can furnish no aid in giving efficacy to it." * * * "It has been
37 thought by some of the judges that, the contract being in itself compatible with the strictest rules of morality, and being opposed by only a temporary and war regulation which exists no longer, may now be enforced. But upon more mature consideration, the majority of the judges accede to the opinion that the contract being clearly in fraud of the law as existing at the time," "its execution cannot be compelled by the courts of that country to evade whose laws it was made." Being satisfied on reason and authority that the war policy of a government should be respected and upheld by the courts of a country even after the war has ended, I pass to the inquiry whether this war policy of our government can be asserted against this claimant, and concerning the present cause of action.

It has been said that in the case of a civil war, an alien residing in his own neutral territory may trade with insurgents who have been recognized as belligerents, and that, by a universal rule of public law which has been often recognized and maintained by the United States, such traffic is lawful and to be upheld. Let it be conceded that such is the fact and the rule, and that the courts of the United States cannot in good conscience deny the prosecution of this right which they would accord to one of our citizens were the parties and conditions of the case reversed. Let it be conceded that all exterritorial transactions are to be maintained in our courts though their purpose and effect were to injure the government and prolong the rebellion. Let it be conceded that if a citizen of the United States had gone from Richmond to Liverpool, and there bought arms for the use of the Confederate troops—that fact appearing on the face of the contract, and he adding to it his personal guarantee—that a suit might be maintained upon it in our

courts, and no denial upon the ground of public policy be asserted. The question still remains whether the claimant's purchases of cotton on insurgent territory during the war were exterritorial. "The laws of every state," says Story, (*supra*,) and I may add, the public policy of every state, "affect and bind directly all property, whether real or personal, within its territory," "and also all contracts made and acts done within it." The laws and public policy of the United States may not have extended to the person of the claimant; did they attach to these transactions and to this property? In a word, were purchases by a non-resident alien within our insurgent territory, while it was held by the *de facto* government of the Confederate States—were they, so far as our laws and public policy were involved, exterritorial?

Before the decision of the Supreme Court in the case of *Carlisle & Henderson*, (8 C. Cls. R., 153,) I had been inclined to hold with regard to aliens domiciled or temporarily residing in our insurrectionary district, that he who did nothing to violate the laws of the United States so long as they were paramount could not be held to violate them after they had been, for the time, superseded by the laws of a government *de facto*. My impression, indeed, was that an alien owing a temporary allegiance to a government *de facto* which affords him protection, cannot be held at the same time to owe a constructive local allegiance to a distant government *de jure* which affords him no protection. After foreign governments had recognized in the Confederacy a belligerent power, I had supposed that they would not consent to their subjects in the South being held amenable to the laws of the United States until those laws were re-established by force of arms. I have since examined (*Green's Case*, 8 C. Cls. R., 412) every authority cited on the argument, and in the decision of Carlisle & Henderson, and find that they all treat the local allegiance which an alien temporarily owes to the government under which he voluntarily came, as reciprocal for the protection which it affords to him. They hold, substantially as set forth in the words of East, (Crown Law, chap. ii., § 4,) that "the local allegiance" "which is due from a foreigner" "is founded in the protection he enjoys for his own person, his family and
38 effects, during the time of that residence." Nevertheless the doubts which I entertained as to the existence of the rule where the reason of the rule had ceased, do not prevent me from recognizing the conclusive character of that decision.

Its significance will be best gathered from its facts, which, as condensed in a former statement, (8 C. Cls. R., 419,) were these: "Two Englishmen, resident within the insurrectionary states, were engaged in the manufacture of saltpeter there. They did nothing to bring about the rebellion, nor in any way violated the municipal law of the United States. After the authority of the United States had ceased to be paramount, they did not take up arms or commit any overt act of hostility, but continued their business of making

and selling saltpeter. In time the Confederate government came to them as a customer, and they sold to it. By this court it was held that saltpeter is one of that class of articles which may or may not be contraband of war, and that amid the circumstances of this sale it was contraband, and the selling, as a matter of fact, aid and comfort to the rebellion. But this court never undertook to hold that the selling was a crime, a betraying, a treachery, or a breach of faith. The Supreme Court, on the contrary, held the selling to have been a crime against the laws of the United States, the claimants criminals, their offense treason," and that the territorial authority of the United States continued within the Confederate military lines, where the aliens were, so completely that the mere sale of this contraband article to the Confederate goverment, with knowledge that it was to be used for the prosecution of the war, made them "participators in the treason of the Confederates *equally as if they had been original conspirators* with them." That is to say, the Supreme Court determined, as I understand the decision, that the authority of the United States continued territorially throughout the rebellion as it existed before the rebellion, and that it attached to persons, property, and transactions, to citizens and to aliens, so completely that nothing which took place on Confederate soil can ever claim the immunity of being exterritorial.

I am, therefore, constrained to hold that when the claimant, in the person of his agent, entered the port of Savannah he entered the territory of the United States and left behind him his character of a foreign neutral, and that the property which forms the subject of the present suit was then and ever has been within the territory of the United States, subject to all the restrictions of their municipal law and national policy.

The war policy of the government from the beginning of the rebellion to its close was to cut off the insurrectionary districts from commercial intercourse with each other and with all the world. The purpose which I ascribe to the claimant in the purchase of this cotton was twofold: to bring in supplies and carry out products against the public policy of the country, and to collude with revolting citizens, in fraud of our laws, to change the title of property which would otherwise have been subject to confiscation. Trade and traffic in the insurrectionary district necessary for the well-being of society have been upheld, but no transactions treasonable in their nature, or designed in fact or in contemplation of law to prolong the rebellion, have received the aid of our courts. The tests which I apply to the claimant's transactions are these: If a citizen of the United States, domiciled during the war of the rebellion on loyal territory, say in New York, were to bring an action upon a contract for blockade-running, would a court of the United States give effect to it as a legally meritorious contract? If the responsible
39 leaders of the insurrection had conveyed away their property to evade confiscation, could they resort to our courts to ac-

quire the fruits of such transactions? Manifestly not, and the courts of a country will not aid a foreigner to accomplish that which the laws or policy of the country forbid to its own citizens. In my judgment, the claimant's title to the property in suit, having been acquired through blockade-running and for the purposes of blockade-running, cannot be upheld in the courts of this country.

I place my decision entirely upon this ground of improperly-acquired title, but there are other questions in the case to which I deem it proper to advert.

On the former decision I was also of the opinion that as the *Amended Court of Claims Act* (12 Stat. L., 765, § 12) contemplates aid and comfort to rebellion by two classes of persons, viz., those who owe and those who do not owe allegiance to this government, and closes the court equally to both, it would follow that the claimant, who in fact rendered aid and comfort, though by means of a traffic lawful at public law, could not prosecute his suit, though guiltless of an offense against our municipal law. It is due to the able arguments of the present trial to say that they have demonstrated, in my maturer judgment, the error of that conclusion. When Congress prescribed in the abandoned or captured property act the terms and conditions on which owners of captured property may recover the proceeds thereof, a court, I now think, cannot import other terms and conditions from another statute, though it may refer, as the Supreme Court did in *Zellner's Case*, (7 C. Cls. R., 137,) new subjects of jurisdiction to the practice and remedial processes prescribed and granted by the former act. The "aid or comfort" which would form a bar to the claimant's recovery is the "aid or comfort" defined and intended by the abandoned or captured property act; and that "aid or comfort" the Supreme Court has interpreted in the case of aliens, as of citizens, to be the breach of allegiance constituting an offense or crime.

I am also of the opinion that the case is now in precisely the same plight that it was in when first tried. The defendants have gained no legal point by the new trial. Whether a foreign neutral sold goods contraband or not contraband to a belligerent, his traffic was legal at public law, and his act, aid or comfort to the insurgents as a matter of fact. The sending of cannon through the blockade was no more an offense against our municipal law or the public law than the sending of bread; and whatever difference there may be is one of degree, and not of kind. The giving of cannon to the Confederate cause was a mere incident of his commercial transactions; and if a foreign neutral may give to a belligerent things contraband of war for a consideration, it is altogether too refined an exception to say that it would be an offense for him to give them without a consideration. Neither the magnitude of the sale nor the nature of the thing sold nor the motive of the giver can make this intercourse a crime.

Nor can I agree than any act which is not an offense against the

municipal law of the United States will impose upon the claimant a disability to prosecute his suit in this court for the proceeds of his captured property. Before the decision of the Supreme Court defined the words "aid or comfort to the present rebellion" in the abandoned or captured property act to import a crime and impose a personal disability to maintain a suit, this court had construed the statute as one enacted midway in the rebellion, prospective in its character and intent, whose controlling purpose was to prevent individuals from aiding the rebellion, and to that end assuring those who should continue to refrain (and no others) of the restitution of their captured property. Pursuant to this supposed purpose of the statute, it had been held that the title passed by capture and vested absolutely in the United States; that the restitution of the proceeds to the loyal was founded on compact and in the nature of a reward for their meritorious conduct, and hence that abstaining from giving aid or comfort was a jurisdictional fact, irrespective of allegiance or felonious intent, and equally conditional upon all suitors, be they citizens or aliens, enemies or neutrals. In accordance with these general principles, it had been held in the cases of deceased owners that the right to recover depended upon the loyalty of him who had owned the property, and not upon that of the administrator or other representative who chanced to bring the suit; and, in the cases of persons who relied upon the pardon of the Executive, that pardon or amnesty, while it might obliterate an offense, could not restore the substantial compact which the party had broken, or change the operation of a statute so as to relieve a party from making proof of a jurisdictional fact.

By the Supreme Court an utterly different interpretation was given to the statute; which interpretation was reiterated in such varied forms and manifold cases that no plausibility of statement or sophistry of reasoning can warp the meaning or undo the construction.—(*Klein's Case*, 7 C. Cls. R., 240; *Carroll's Case*, id., 255; *Armstrong's Case*, id., 280; *Pargoud's Case*, id., 289.) This construction, moreover, was intensified by the fact that each decision involved the reversal of a judgment and laid down a rule which authorized other recoveries in then-existing suits and shattered the supposed title of the government to a fund in which its ultimate proprietary interest would have amounted, as was believed, to more than $20,000,000.

The court (*Klein's Case*, 7 C. Cls. R., 240) classified all "property in the insurgent states" and designated the fourth class as of "a peculiar description, known only in the recent war, called captured and abandoned property." Of this property the court held that the title did not pass by capture. The court, moreover, held that the title could not have been divested by any means except a judgment of confiscation after due legal proceedings. From these premises the court logically drew the deduction that the government, having had no title or interest of its own in the captured property, was but

the trustee of the fund, holding it for the use of those entitled to it by the express terms of the statute, and for all others who might at any time be recognized as entitled to it on considerations of public policy; and that the criminal offense of giving aid or comfort was not a matter affecting a compact or going to the jurisdiction, but constituted a personal disability to maintain an action which, because it was criminal, could be removed by the pardon of the Executive.

If it now be conceded that the claimant in this suit became the owner of this cotton by a contract not repugnant to the laws or public policy of the United States, the government stands before us as a suitor in the singular attitude of a trustee having in its possession a fund (the subject of this suit in equity) in which it has no proprietary interest, and which it holds for the use of a British subject in whom the property is, yet whose right to sue for this property it denies. For such a case it would seem to me paradoxical were I to hold that the United States are trustees for one whose property in their possession has not been divested by capture or confiscation and who has committed no offense against their municipal law, yet who, nevertheless, cannot pursue the remedy provided by statute for a *cestui que trust* in such cases because of a bar arising from a duplicity of construction that ascribes to the same words of the same statute an intent to make the crime, and not the act, a personal disability for one party, and the act without the crime a personal disability for another. I cannot approve of any such duplicity of construction as would attach the consequences of crime to acts wherein no crime existed. And if it be said that the generality of the terms used in the statute nevertheless include the exterritorial acts of a foreign neutral, I must say, as Lord Stowell said of an English statute in the case of the *Le Louis*, (2 Dods. Ad. R., 239,) "neither the British act of Parliament, nor any commission founded on it, can affect the rights or interests of foreigners unless they are founded upon principles and impose regulations that are consistent with the laws of nations. That is the only law which Great Britain can apply to them; *and the generality of any terms employed in an act of Parliament must be narrowed in construction by a religious adherence thereto.*"

41 XVI.—*Request by the defendants for additional findings of fact and the ruling of the court thereon.*

The court are respectfully requested to find these additional facts, viz:

I. That Alexander Collie continued a member of the Manchester house of Alexander Collie & Co. after he removed his own residence to London.

II. Other persons were jointly in business with Alexander Collie in London, the style of the firm there being Alex'r Collie & Co.

III. That other persons were interested with Alexander Collie in

the enterprises mentioned in the second of the findings of facts already filed by the court in this cause. That the cotton of which the proceeds are the subject of this claim, although bought by Theodore Andreae, who was sent out to Wilmington, North Carolina, by Collie in 1862, and is the agent mentioned in the third
42 finding filed by the court, was purchased with funds in part furnished in part by other persons so associated with Collie in these adventures, through our blockade before mentioned. It does not appear that any one beside Collie was known to Andreae as interested with Collie in this business, or that Andreae received instructions from or communicated with any other persons relative thereto, except as the professed agent of Alexander Collie. Andreae must have known, however, of the interest of North Carolina and of the Confederacy in the vessels which they owned jointly with Collie.

IV. That one Crenshaw was jointly interested in the vessel owned partly by Collie and partly by the Confederate States.

V. That of those steamers, of which the State of North Carolina owned one-fourth, three-fourths were owned jointly by Collie
43 and his friends, who engaged with him in these adventures.

VI. The vessels for the adventures aforesaid were bought with funds partly provided by Alexander Collie & Co., and in part by his friends, who subscribed to them in shares of £500 each. The cargoes were in part procured in the same way, and in part by shipments of the goods dealt in by subscribers; i. e., as to those cargoes not provided for the Confederate government and the State of North Carolina.

VII. The Giraffe, bought as the first vessel for Collie and others, second adventure, was sold to the Confederate government. After such sale she was caused by Collie to be registered and documented as an English vessel.

VIII. After the sale of the Giraffe, prior to her delivery, and while so documented as an English vessel, and commanded
44 and manned by an officer and crew put on board by Mr. Collie, there was carried in said vessel military and naval officers of the Confederacy and cannon and ammunition for the Confederate government.

IX. The vessels owned jointly by Collie and others and the Confederate government sailed under the English flag and with English papers.

X. The vessel owned by Collie and his friends jointly with the State of North Carolina was sailed under the English flag and with English papers.

EDWIN B. SMITH,
Asst. Att'y-General.

Upon the foregoing requests the court makes the following rulings, to wit: The second of the above requests is refused. The third is

refused as not established by the evidence to the satisfaction of the court, except the first sentence thereof, which is allowed. All the rest are allowed.

By the court.

45 XVII.—*Final Judgment.*

ALEXANDER COLLIE'S TRUSTEE
vs.
THE UNITED STATES. } No. 2726.

At a Court of Claims held at the Capitol, in the city of Washington, on the 29th day of June, A. D. 1877, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the court.

46 XVIII.—*Application of claimant for allowance of appeal and order allowing same.*

Now comes the said claimant, by his attorneys, and in open court prays an appeal from the judgment heretofore rendered in said cause to the Supreme Court of the United States.

J. HUBLEY ASHTON,
C. F. PECK,
Attys. for Claimant.

Filed July 2, 1877.

Ordered, That the appeal be allowed as prayed for.
By the court.
July 2, 1877.

47 In the Court of Claims.

ALEXANDER COLLIE'S TRUSTEE
vs.
THE UNITED STATES. } No. 2726.

I, John Randolph, Assistant Clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleading in the above-entitled cause, of the findings of fact and conclusion of law, of the opinion of the court and dissenting opinion on said findings, and of the judgment of the court of May 15, 1874, of the application for and allowance of an appeal therefrom, of the filing of the order of the Supreme Court of the United States dismissing said appeal, of the motion for a new trial, and of the order of the court granting said motion, of the application of claimant for the allowance of an appeal from said order granting a new trial, and of the order of court refusing the same, of the order of

48 the court substituting John Young as trustee, as party claimant, of the findings of fact and conclusion of law thereon filed June 21, 1877, of the opinion of the court and two concurring opinions on said findings of fact, of the request of the defendants for additional findings of fact and the ruling of the court thereon, of the final judgment of the court, entered June 29, 1877, of the application for the allowance of appeal from said judgment, and the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington, this 19th day of September, A. D. 1877.

[SEAL.]

JOHN RANDOLPH,
Asst. Clk. Court of Claims.

(Endorsed on cover:) Court of Claims. No. 781. John Young, trustee in bankruptcy of Alexander Collie, appellant, vs. The United States. Filed 3rd October, 1877.

Supreme Court United States.

OCTOBER TERM, 1877.

No. 781.

JOHN YOUNG, Trustee in Bankruptcy of ALEXANDER COLLIE, Appellant,

vs.

THE UNITED STATES, Appellees.

APPEAL FROM THE COURT OF CLAIMS.

PHILADELPHIA BAR ASSOCIATION

ARGUMENT FOR THE CLAIMANT AND APPELLANT.

J. HUBLEY ASHTON,
Of Counsel.

Thomas McGill & Co., Printers, Washington, D. C.

CONTENTS OF ARGUMENT.

PART I.

	Page.
GENERAL PRINCIPLES OF INTERNATIONAL LAW APPLICABLE TO THE CASE	8 to 82
I. The Southern Rebellion a civil war	8 to 17
II. The relative rights of the United States and neutral States in the civil war	17 to 30
III. Municipal interference with neutral trade in civil war	30 to 41
IV. General doctrines of public law as to rights of commerce in time of war	41 to 51
V. Commerce by neutrals within the territory of a belligerent	51 to 55
VI. Trade in contraband of war	55 to 79
VII. Belligerent penalty in case of contraband	79 to 82

PART II.

THE OWNERSHIP OF THE PROPERTY	82 to 106
I. Mr. Collie, the owner	82 to 85
II. The validity of the title	85 to 91
III. Transactions lawful under public law	91 to 95
IV. Blockade of Confederate ports a belligerent blockade	95 to 99
V. Law of blockade the same in a civil war as in a foreign war	99 to 103
VI. Transactions not affected by so-called war policy	103 to 105
VII. The *jus postliminii* does not apply to the case	105 to 107

PART III.

THE RIGHT TO RECOVER THE PROCEEDS UNDER THE ACT OF MARCH 12, 1863	107 to 201
I. The Captured and Abandoned Property Act	107 to 112

Page.

II. Jurisdiction of Court of Claims in cases of military and naval captures..... 112 to 117
III. Effect of dismissal of present claim..... 117 to 118
IV. Discrimination against neutral subjects unlawful.. 118 to 123
V. The canons of construction..... 123 to 128
VI. Private property on land not booty of war under modern public law..... 128 to 133
VII. The Act of March 12, 1863, a remedial statute..... 133 to 141
VIII. The property *de jure* and *de facto* neutral property..... 141 to 146
IX. Presumption in favor of restitution of property of neutrals..... 146 to 149
X. The acts of Mr. Collie innocent and lawful under the law of nations..... 149 to 155
XI. Acts of neutrals involve only a certain fixed penalty..... 155 to 158
XII. No distinction between so-called gifts and sales of contraband..... 158 to 163
XIII. The transactions not in violation of the "Foreign Enlistment Act"..... 163 to 169
XIV. Other complaints against the claimant..... 169 to 171
XV. American doctrine of no confiscation for contraband..... 171 to 177
XVI. The policy and purpose of the statute..... 177 to 182
XVII. The words of the Act import *crimes* described by Act of July 17, 1862..... 182 to 189
XVIII. Mr. Collie never gave "aid or comfort" to the rebellion..... 189 to 194
XIX. The decisions of the Supreme Court in cases under Act of March 12, 1863..... 194 to 201

PART IV.

THE AMNESTY OF THE PRESIDENT..... 202 to 208
I. General proposition of the argument..... 202 to 204
II. The extent of the pardoning power..... 204 to 206
III. The Proclamation of December 25, 1868..... 206 to 208

Supreme Court of the United States.

October Term, 1877. No. 781.

JOHN YOUNG, TRUSTEE IN BANKRUPTCY OF ALEXANDER COLLIE, APPELLANT,

vs.

THE UNITED STATES, APPELLEES.

Appeal from the Court of Claims.

BRIEF FOR THE CLAIMANT.

STATEMENT.

This is an appeal from a judgment of the Court of Claims, dismissing a petition originally filed by Alexander Collie, a British subject, under the provisions of the Captured and Abandoned Property Act of March 12, 1863, to recover the net proceeds in the Treasury of the United States of a large amount of cotton, belonging to the petitioner, captured by the military forces of the United States, at the city of Savannah, in the month of December, 1864.

The petition was filed in the Court of Claims on the 11th of June, 1867, and, pending the final determination of the case, Mr. Collie became bankrupt, and his trustee in bankruptcy, Mr. John Young, was accordingly substituted as the claimant of record in the present case.

The case has been twice heard and twice decided by the Court of Claims. The first judgment, rendered on May 15, 1874, in favor of the claimant, was set aside on the

8th of January, 1877, by the Court of Claims, pending an appeal by the United States to this Court, by an order granting a new trial of the cause. The case was soon afterward again tried in the Court below upon the original testimony, and other evidence introduced by the United States, which cannot be deemed to have changed, as correctly observed by Judge Nott, in his opinion, the legal aspects of the case as it stood originally before the Court. (Record, p. 42.)

The result of the second trial, however, was a judgment dismissing the petition; and from that judgment Mr. Young, the trustee in bankruptcy, has taken the present appeal.

The general facts of the case may be very briefly stated: Mr. Collie was a subject of the Queen of Great Britain and Ireland, personally and commercially domiciled, during the late civil war, in England, and it is found that he has at no time been in the United States.

He was a British merchant, and appears to have more or less extensively engaged in commerce with the Confederate States.

He at one time resided in Manchester, England, as a member of the firm of Alexander Collie & Co.; but, in the years 1862, 1863, and 1864, he resided and did business in his own name in London, where he entered into the transactions referred to in the record with the Confederate Government and the State of North Carolina.

The general facts in regard to Mr. Collie's business and trade with and within the Confederate States, are found to have been that, for some two years, during the war, he was somewhat extensively engaged in maritime commerce with that territory, fitting out vessels which transported from Great Britain to the blockaded ports general merchandise, which was there sold, and also munitions of war, and other articles contraband of war, which were delivered to the Government of the Confederate States, and which brought back to England large quantities of cotton, partly received from the Confederate Government in payment or exchange

for the munitions of war, and other like articles, delivered to that Government, and partly bought for him by his agent with moneys derived from the sales there of the cargoes of merchandise shipped by him to the Confederate States.

The Court below find, that the cotton for whose proceeds this suit was brought, was purchased in the Confederate States, in the years 1862, 1863, and 1864, by Mr. Collie, through his agent, sent out by him, in 1862, with moneys so derived. (Record, p. 13; also p. 18.)

It consisted of 3,096 bales of upland cotton and 1,757 bales of sea-island cotton; all of which was stored in Savannah at the time of the capture of that city by the military forces of the United States, in December, 1864, and was there seized and taken by those forces, and thence shipped to New York, where it was sold, under the authority of the United States; and the proceeds of the sale, amounting to $950,076.71, were paid into the Treasury of the United States.

It would seem unnecessary to make any minute statement here as to the nature, the number, or the details of the various transactions in which Mr. Collie was engaged, during the period of hostilities, in the course of his commercial intercourse and relations with the Confederate States and the State of North Carolina, involving general maritime commerce with the blockaded ports, the supplying and employment of vessels, under contracts with the State of North Carolina and the Government of the Confederate States, to facilitate his trade with the belligerent territory, dealings in North Carolina cotton-warrants, and the transportation and delivery to the Government of the Confederate States and the State of North Carolina of articles, absolutely, or otherwise, contraband of war.

These transactions are clearly enough presented in the finding of facts made by the Court of Claims. They were perfectly lawful transactions, in the course and prosecution of a legitimate business, and such as occur, on the part of

neutrals, in every war in which one of the belligerents is affected by a maritime blockade of his commercial ports; and such as the merchants and manufacturers of this country have been in the habit of carrying on with maritime belligerents, in all the wars which have occurred since the nation has had a history, and such as are now being carried on by our merchants and manufacturers in the pending hostilities between Russia and Turkey.

The objects which entered into the traffic of this British merchant with the Confederate States and the State of North Carolina,—arms and military supplies, ships, money, &c.,—were, and are, under the public and municipal jurisprudence of Great Britain and the United States, legitimate objects of trade with a belligerent in the territory of a neutral State, and of maritime commerce between neutral and belligerent territory.

The methods of Mr. Collie's business, as disclosed in the finding of facts, were precisely those which are familiar to the student of the law of maritime warfare, as contained in the adjudications of the Prize Courts of Great Britain and the United States. The interest of belligerents in ships, cargoes, contracts, and general speculations, carried on for the mutual benefit of neutral merchants and belligerents, under the protection of neutral flag and papers, is observable in cases of maritime capture, in all wars, and the Prize Code enables the belligerent affected by such transactions to apply to the property, on the high seas, the appropriate remedy.

The Court of Claims finds that, in March, 1864, Mr. Collie sent as a present to the Confederate authorities at Wilmington, on one of his steamers engaged in running the blockade into that port, a Whitworth gun for field service, with appendages, &c., which was accepted and used by those authorities; that, in the same year, he presented to the Confederate States two Whitworth guns, which were used by that Government in its service; and that, in the same year, Mr. Collie made a donation to the Confederate authorities of $30,000, to aid the needy and suffering in the insurgent

States, and more particularly those who had been made so through the war. (Rec., p. 18.) These transactions are the subject of some appropriate observations in the opinion of Judge Nott, who correctly states that they were mere incidents of his general commercial transactions with the Confederate States. (Rec., p. 42.)

The legal nature and effect of the acts of the petitioner in his intercourse and trade with the Confederate States, during the war, in the estimation of the public law, do not depend upon the multitude, or the circumstances, of his transactions in the sale, transportation, and delivery of articles within the designation of contraband of war; nor is it important to inquire whether those transactions were one or many, with reference to any question arising upon the construction and effect of the provisions of the Captured and Abandoned Property Act, which have not attempted, we maintain, to attach any consequences to those transactions, or any of them, with respect to the property whose proceeds are here sought to be recovered.

It will clearly appear, we think, from the subsequent argument, that, as the Government of the United States, consistently with due observance of public law, could not affect him with the appropriation or forfeiture of this property for any acts found to have deen done by him, so it has not attempted to do so, by the act of March 12, 1863, which expressly provides for the restoration of the proceeds in the Treasury of the United States.

The principal propositions maintained in the following argument are these:

First. That Mr. Collie acquired a valid and indefeasible title to the cotton here in controversy, by lawful purchase in the territory of the Confederate States, and that he was the owner of that property at the time of its capture at Savannah.

Second. That the acts found to have been done by him, during the late civil war, did not, nor did any of them, con-

stitute aid or comfort to the rebellion, within the meaning of the 3d section of the Captured and Abandoned Property Act of March 12, 1863; and, therefore, that he is not affected with any disability to reclaim and recover the proceeds of the property, under the provisions of that statute.

Third. That if the acts, or either, or any, of them, found to have been done by him, constitute aid or comfort to the rebellion, within the meaning of that statute, he is relieved from the consequence annexed to such acts, by the operation and effect of the pardon and amnesty granted by the President by his Proclamation of December 25, 1868.

The subjects-matter of this Argument are as follows:

Part I. *The General Principles of International Law applicable to the Case.*

Part II. *The Ownership of the Property.*

Part III. *The Right to Recover the Proceeds under the Act of March* 12, 1863.

Part IV. *The Amnesty of the President.*

Assignment of Errors.

The Court below erred—

1. In dismissing the petition.

2. In not entering a judgment in favor of the claimant for $950,076.71.

ARGUMENT FOR CLAIMANT.

PART I.

GENERAL PRINCIPLES OF INTERNATIONAL LAW APPLICABLE TO THE CASE.

I.

The Southern Rebellion a Civil War.

The legal character of the late Southern Rebellion as a *geographical* or *territorial civil war*, (as distinguished from an insurrection or unorganized war,) possessing the characteristics and attended with the incidents and consequences of a *public war* between established and mutually-recognized Governments, is a political and juridical fact; attested by the doctrine of public law; recognized formally, or otherwise, by all the great Powers of the world; and adjudged by every Department—Executive, Legislative, Judicial—of the Government of the United States.

1. Publicists agree that where the exercise of an established government's jurisdiction has been revolutionarily suspended in one or more territorial districts by the action of revolted insurgents, who, under claim of political nationality, have established, *de facto*, a government of their own, excluding the former government from all power and control, and hostilities are prosecuted on both sides upon the footing and with the powers and according to the usages of actual war, the legal character of the contest is *civil war*, as distinguished from mere rebellion or unorganized war, and

that the law of nations regards both the parties to the contest as entitled to exercise the rights and powers, and subject to the duties and obligations, which pertain to independent sovereign States, as belligerents, in foreign or international wars.

(*a.*) The doctrine of international law, upon this subject, is declared by Vattel in these classic words:

"The sovereign, indeed, never fails to bestow the appellation of *rebels* on all such of his subjects as openly resist him; but when the latter have acquired sufficient strength to give him effectual opposition, and to oblige him to carry on the war against them according to the established rules, he must necessarily submit to the use of the term 'civil war.'

"A civil war breaks the bands of society, or, at least, suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as thenceforward constituting, at least for a time, two separate bodies, two *distinct societies*.

"Though one of the parties may have been to blame in breaking the unity of the State and resisting the lawful authority, they are not the less divided in fact. Besides, who shall judge them? Who shall pronounce on which side the right or wrong lies? On earth they have no common superior. They stand, therefore, in precisely the same predicament as two *nations* who engage in a contest, and, being unable to come to an agreement, have recourse to arms."

Vattel, Bk. III, § 292.

The great South American jurist, Bello, declares the international character of the insurgent power, in such a contest, in these words:

"Civil wars frequently commence by popular tumults, which in nowise concern foreign nations; but when one faction or party obtains dominion over an extensive territory, gives laws to it, establishes a government in it, administers justice, and, in a word, exercises acts of sovereignty, it is a *person in the law of nations;* and however so much one of the two parties gives to the other the title of rebel or tyrant,

foreign Powers which desire to maintain their neutrality ought to consider *both* as two *States*, independent as respects one another and other States, and who recognize no judge of their differences."

Principios de Derecho Internacional, cap. X, p. 267

The international view of the relations of the parties to such a contest, and of the right and duty of foreign States in respect to it, is pronounced, in substantially the same terms, by Hautefeuille, (Droits et Devoirs de Nations Neutres, vol. 1, p. 231,) and by Professor Bluntschli, (Revue de Droit International, 1870, pp. 455, 458, 461, 462.)

Hautefeuille says:

"Indeed, foreign nations cannot intervene between the belligerents. The quality of revolted subjects which one of the two gives to the other, must be disregarded by them. They are not, and cannot be, judges of the justice, or of the injustice, of the war. Nations that desire to remain neutral must accept the *de facto* situation. If they wish to be respected by the two contending parties, they ought to recognize and respect both of them equally. The foreign State that should refuse to fulfill the duties of neutrality towards the insurgents could not claim the right to be regarded as neutral: it would be, in their eyes, the ally of their enemy, and they will treat it as such with justice. On the other side, the sovereign who fights to bring back under his control his revolted subjects cannot deem himself offended if neutrals should fulfill their duties towards his enemies, because he cannot demand of them that they should become his allies; and if they should refuse to comply with these duties, they would actually become his allies and the enemies of his adversaries. Besides, the revolted insurgents who, with armies organized upon military principles, undertake by war to carry out their political scheme, act, though they do not constitute a State, as if they constituted a State—as a *quasi* State. They affirm the justice of their cause, and the legitimacy of their mission, in good faith, equal to that which is presumed, as a right, in all belligerent States."

Dr. Bluntschli concludes his review of the legal character of the contest, in the judgment of international law, between

the Northern and Southern States of the American Union, with these words:

"Every one agreed that there was *war*, and that, in this war, there were two *belligerent* parties."

That when a rebellion attains the proportions of a civil war, foreign nations have the right to recognize the contest as a *war*, in the sense of the public law, and that both the contending parties are entitled to all the rights and subject to all the duties which pertain to the status of belligerency in an international war, are treated by publicists as fundamental principles of international jurisprudence. They are so treated by our own jurist, Mr. Wheaton, (Wheaton, Dana's Ed., p. 34, p. 374,) and by one of the most accomplished of living English jurists, Sir Travers Twiss, who declares:

"Where there is a state of war *de facto* between parties, which cannot be preceded by a declaration, as in the case of a civil war, where part of a nation has erected a distinct and separate Government, the existence of a state of war is of necessity recognized by foreign Powers, although they may not have acknowledged the political independence of the new Government; and foreign courts administering the law of nations have uniformily treated each party as a belligerent, in reference to all acts asserted to have been done *jure belli*." (Law of Nations, War, p. 72.)

(*b.*) That the great Southern Rebellion, conformably to all the tests by which the public law enables the jurist to determine the international character of such a contest, was a territorial civil war of the most absolute character known to the jurisprudence and history of nations,—a war which all foreign nations were of right entitled to treat as invested with all the juridical incidents of a war between recognized sovereigns,—must be regarded as a proposition no longer, if it ever was, the subject of dispute or doubt.

2. All foreign nations, with the exception, perhaps, of China and Turkey, formally or otherwise, recognized the

contest as a war, and the insurgent power as a *de facto* Government and belligerent nation, having, so far as concerned them and their citizens, the sovereign rights of war, and entitled to be respected in the exercise of those rights.

By the concurrent action of the great maritime Powers more immediately affected by the relations of hostility which supervened between the contending parties, the contest, by public proclamations or decrees emanating from the political authorities of their governments, was formally recognized as a state of war, attended with the incidents and consequences, and giving rise to the special rights and duties, which, under the law of nations, flow from a state of war between independent nationalities.

Such proclamations, declarations, or decrees were issued respectively on the 14th of May, the 10th of June, the 17th of June, and 1st of August, 1861, by the Governments of Great Britain, France, Spain, and Brazil; and others were subsequently likewise issued by other maritime Powers.

By the Queen's Proclamation of May 14, 1861, the commencement of hostilities between the United States and certain States styling themselves the Confederate States, and the determination of Great Britain to maintain a strict and impartial neutrality in the contest between the contending parties, were announced, and British subjects and all other persons under the protection of Her Majesty's Government were warned (1) that for violations of the Foreign Enlistment Act they would be liable to the penalties by that statute provided; (2) that for *breach of any blockade* lawfully and actually established by either of the contending parties, or for the *carryiny of any articles contraband of war*, according to the law or modern usage of nations, for the use or service of either of the belligerents, they would be liable to the penal consequences by the *law of nations* in that behalf denounced.

The Proclamation thus recognized the law of nations, and the law of nations alone, as applicable to the commerce of British subjects with the belligerent Powers, by declaring that for violations of the Foreign Enlistment Act persons

would be visited with the penalties of that statute, while trade to blockaded ports and the transportation of contraband of war would affect the parties with the penalties of international law, (viz., the capture and confiscation of the peccant property,) and that against the latter penalties no protection from the Crown must be expected.

The British Proclamation, and the public declarations or decrees to the same effect of the other maritime Powers, were made in conformity with the practice of nations in similar cases of internecine war, as illustrated by the action of the Government of the United States in the case of the civil war between Spain and her South American colonies, (U. S. *v.* Palmer, 3 Wh., 610; The Estrella, 4 Wh., 298; The Divina Pastora, *Ib.*, 52; The Nuestra Senora, *Ib.*, 501,) and that of the civil war between Texas and Mexico. (3 Opinions of Attorneys-General, 120.)

The diplomatic complaint of the United States, that the British Proclamation was "unprecedented and precipitate," has not received the sanction of publicists. Professor Woolsey, referring to the fact of the capture of several neutral vessels between the 19th of April, the date of the President's Proclamation of blockade, and the 13th of July, 1861, when Congress sanctioned the Executive proceedings for meeting the rebellion by the powers of war, and the decisions of the Supreme Court in the "Prize Cases," affirming the validity of those captures, says: "It would seem, then, that if the British Government erred in thinking that the war began as early as Mr. Lincoln's proclamation in question, they erred, in company with our Supreme Court." (International Law, p. 459.) The valuable note of Mr. Dana on this subject leads to the conclusion that the diplomatic complaint of the United States as to the proclamation was not well founded, (Wheaton, p. 37,) as do the remarks of Professor Bluntschli; (Opinion Impartiale sur la Question de l'Alabama;) and the whole question was definitely abandoned by the late Treaty of Washington, which conceded the belligerent character of the insurgent States and the

neutral character of Great Britain, in the sense of the public law, during the contest.

3. When to the doctrines of international law, and the political declarations of foreign States as to this contest, we superadd the definite determinations of the three great Departments of the Government of the United States itself, pronouncing and adjudging the existence of a state of war between the United States and the insurgent States, defining the war as a territorial or geographical war, and impressing upon the entire communities of eleven States the international quality of public enemies of the United States, it must be regarded as a necessary postulate, in every case involving the rights of the subjects of foreign States, as to transactions growing out of the late hostilities, that the contest was, in a juridical sense, a war between lawful belligerent powers, in which neutral subjects were entitled to the same rights, and subject to the same duties and liabilities, and only those, that pertain to neutrals, under the law of nations, in ordinary wars between independent nations.

The blockade of the ports of the insurgent States, under the President's Proclamations of April 19 and 27, 1861, recognizing the existence of a state of war, was followed by the act of Congress of July 13, 1861, authorizing the President to declare the hostile character of the States under the control of the insurgent organizations. This act was justly treated by the judges of this Court, who held that civil war, in the legal sense, involving consequences that belonged to belligerent rights, could only exist by the declaration of the war-making power of the Government, as a formal and public *declaration of war* under the Constitution against the insurgent States. (The Prize Cases, 2 Black, 695.)

"Civil war," said Judge Nelson, "under our system of Government, can exist only by an act of Congress, which requires the assent of the two great Departments of the Government—the Executive and Legislative. Congress assembled on the 4th of July, 1861, and among the first

acts passed was one in which the President was authorized by proclamation to interdict all trade and intercourse between the inhabitants of States in insurrection and the rest of the United States, subjecting vessel and cargo to capture and condemnation as prize, and also to direct the capture of any ship or vessel belonging in whole or in part to any inhabitant of a State in insurrection, found at sea or in any port of the rest of the United States. (Act of July 13, 1861, secs. 5 and 6.) The President's Proclamation was issued on the 16th of August, 1861, and embraced Georgia, North and South Carolina, part of Virginia, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida. *This act of Congress recognized a state of civil war between the Government and the Confederate States, and made it territorial.*"

The judgment of the majority of this Court in the Prize Cases, however, was, that the President's Proclamation of intended blockade was itself "*official and conclusive evidence* to the Court that a *state of war* existed, which demanded and authorized recourse to such a measure." (2 Black, 670.)

The territory held and controlled by the Government of the Confederate States was by the Court pronounced to be enemies' territory, under the public law, "because it was claimed and held in possession by an organized, hostile, and *belligerent power*." (Ib., 674.) And recognized, as they were, by neutral States, as a belligerent, the Court declared, in the language of Judge Story, in the case of the *Santissima Trinidad*, (7 Wh., 337,) that they were, as respects them, "a belligerent *nation*, having the sovereign rights of war." (Ib., 609.)

During the four years of war, the United States exercised their belligerent rights of maritime capture against neutral property, to the farthest extremity of the public law; and, in some cases, particularly those in which the doctrine of "*continuous voyages*" was applied to contraband of war and blockade, many jurists have thought the Courts of the

United States, in the exercise of their prize jurisdiction, overstepped the just limits of belligerent right.

The character of the contest and the status of the Confederate States and their Government, were defined in another relation by this Court, in the case of *Mauran* v. *Insurance Company*, (6 Wall., 14,) where it was held, that seizures under their authority, on the high seas, were "captures," in the sense of the public law of war.

Mr. Justice Nelson said: "We refer to the conduct of the war as matter of fact for the purpose of showing that the so-called Confederate States were in possession of many of the *highest attributes of sovereignty, sufficiently so to be regarded as the ruling or supreme power of the country;* and hence captures under its commission were among those excepted out of the policy by the warranty of the insured."

The Court, in the subsequent case of *Thorington* v. *Smith*, (8 Wall., 10,) speaking by Chief Justice Chase, who had dissented in *Mauran* v. *Ins. Co.*, placed the Government of the Confederate States in that class of governments known to jurists as *de facto* governments, of which the temporary governments established by belligerent power at Castine and Tampico were well-known examples, and declared that "the central Government established for the insurgent States differed from the temporary governments at Castine and Tampico, in the circumstance that its authority did not originate in lawful acts of regular war; but it was not, on that account, less *actual* or less *supreme*."

As to the capacity of the Confederate Government to acquire title to property, this Court has three times held it was so capable. In the cases of *U. S.* v. *Huckabee* (16 Wall., 414) and *Titus* v. *U. S.*, (20 Ib., 475,) it was decided that it had capacity to acquire title to real property; and in *Whitfield* v. *U. S.* (92 U. S. R., 169) the same principle was applied to personal property.

The doctrine of the legal capacity of the Confederate Government to acquire property, and the successorship of the United States to its public rights of property, were adjudged by the Courts of Great Britain, in suits instituted by

the Government, asserting the sovereign rights of the United States in this regard. (*U. S.* v. *McRae*, 8 Law Rep. Eq., 69; *U. S.* v. *Prioleau*, 2 Hem. & M. C. C., 559.)

When the Court decided that all statutes of limitations between inhabitants of the loyal and disloyal States were suspended during the period of hostilities; (Hanger *v.* Abbott, 6 Wall., 532; The Protector, 9 Wall., 669, 12 Wall., 701;) when it held that the effect of the state of war, after the President's Proclamation of the 16th of August, 1861, was to dissolve all commercial partnerships between inhabitants of the loyal and disloyal States; (Matthews *v.* McSha, 91 U. S. R., 7;) and when it determined that the legal effect of the contest was to terminate all policies of insurance issued by Northern companies on Southern lives, (93 U. S. R., 24,)—the Court affixed to the late hostilities the most decisive qualities, characteristics, and consequences of a state of public war between independent and sovereign States.

But, perhaps, the highest, completest, and most authoritative expression on the part of the Government of the United States, of the juridical character of the rebellion and the status and rights of the insurgent States, as a belligerent power, is involved in those provisions of the Treaty of Washington which required the Tribunal of Arbitration to determine the "Alabama Claims" in conformity with the "Three Rules" of *neutral* duty provided by that Treaty, and the principles of *international law* consistent with those rules; the United States thus conceding that the Confederate States were a belligerent power, and that Great Britain was a neutral State, bound to the duties, and, therefore, clothed with the rights, of international neutrality, in the civil war.

The great and grave questions submitted by that Treaty to the decision of the Tribunal of Arbitration at Geneva, were determined upon the juridical postulate that the civil conflict was a public geographical war, in which the Confederate States were of right entitled to all the *jura belli* that pertain to the *status* of belligerency of a recognized

nationality, and in which Great Britain, as a neutral State, was entitled to all the rights pertaining to the *status* of neutrality, under the public law of nations, in an international war.

II.

The Relative Rights of the United States, and the Subjects of Neutral States, in the Civil War.

Such being the undisputed and indisputable character of the late Southern Rebellion, under the public law, according to the practice and opinion of nations, and the solemn and repeated declarations of the Government of the United States itself, we are brought to the consideration of the general subject of the rights of the citizens or subjects of foreign nations in regard to Commerce with the Confederate States, and the reciprocal rights of the United States in regard to such commerce, whether carried on within the territory of the foreign States, or upon the high seas, or within the territory of the Confederate States. The general proposition of the argument is, that the *relative and reciprocal rights and duties of foreign nations, as neutrals, and the United States and the Confederate States, as belligerents, in the civil war, were governed by those rules of public law which define the rights and duties of neutral and belligerent States in an international war.* Commerce, on the part of neutrals with the Confederate States, was, therefore, subject to be affected by the United States *only* in the exercise, and within the limits, of the rights which, under the *public law*, pertain to a belligerent in respect to neutral commerce in an *international war*.

1. This proposition affirms, as a matter of public jurisprudence, that where an integral portion of a nation separates itself from the parent State, and establishes *de facto* a government of its own, and thereupon a civil war ensues, in which the government *de facto* is recognized as a belliger-

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ent power, trade and intercourse between neutral States and the insurgent territory are wholly withdrawn from the domain of the municipal legislation and authority of the *de jure* Government, and become subject exclusively to those provisions of the Code of International Law which determine the relative rights of belligerents and neutrals.

As against the commerce of the citizens or subjects of neutral States with the territory under the domain of the insurgent belligerent power, the ancient Government is entitled to exercise such rights, and such rights only, as the public laws of war confer upon a belligerent State.

Hence it is that, in a civil war, a Government has no right by any municipal ordinance to close its ports in the firm possession of the insurgent power against neutral commerce, or to interfere by any municipal interdicts with the trade and intercourse of neutrals with those ports. Hence it is that, after a civil war has terminated, with the restoration of the authority of the ancient Government over its ports, that Government cannot punish or affect citizens or subject of foreign States for any supposed violation of its municipal laws or regulations in the course of their commerce with those ports, or enforce against them any new laws or regulations in condemnation of their transactions, during the period of hostilities.

2. The public law treats the insurgent community having the status of belligerency for the purposes of the war, as if it were a sovereign State, invested, though its independence has not been acknowledged, and cannot rightfully be acknowledged, with all the belligerent rights and privileges against its enemy, and against neutral nations, which attach to the status of a belligerent of a recognized nationality. The possession of belligerent rights by the parties to the contest implies, and involves, of necessity, the possession and rightful enjoyment of the correlative neutral rights on the part of friendly foreign States.

That no distinction can be recognized as existing between

civil and international wars as respects the rights of neutral States and their subjects in their relations to the belligerents, will appear upon the slightest consideration of the relative situations of the parties to a civil war, and friendly foreign States affected by the contest.

(*a*) First, let us say that it is an established principle of public law, that when a well-defined portion of the territory of a nation is taken possession of by an organized hostile power, whether recognized as a sovereign State or no, the hostile power is entitled to exercise, throughout the territory, the sovereign rights of municipal legislation; in other words, the hostile power becomes, in contemplation of international law, the *de facto* Sovereign, and its Government the *de facto* Government, and, as such, entitle to the respect of foreign nations.

This Government and this tribunal have had frequent occasion to recognize and apply this principle of public jurisprudence, both in the case of international and in the case of civil wars, and as well when it operated against the United States as when it operated in their favor; and it was specifically applied by this Court in the solution of important questions between the United States and the people of the insurgent States, arising out of their actual relations to one another during the late hostilities.

When the Danish island of Santa Cruz was taken possession of by Great Britain, in the war of 1812, this Court held that it was to be considered a British island. Chief Justice Marshall said: "Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered permanent until confirmed by treaty, yet, *to every commercial and belligerent purpose*, they are considered as part of the domain of the conqueror, so long as he retains the *possession* and *government* of them. *The island of Santa Cruz*,

after its capitulation, remained a British island until it was restored to Denmark.''

The principle referred to was recognized and enforced against the United States in the same foreign war by the decision of this Court as to the *status* of the port of Castine, in Maine, while in the firm possession of the British forces, which declared that the revenue laws of the United States did not apply to that territory any more than to a foreign country, and that this Government could not, after the restoration of the port to the authority of the United States, compel the payment of duties upon goods imported into it during the British occupation. (United States *v.* Rice, 4 Wh., 253.)

The same principle was asserted by this Court when it operated in favor of the Government in another foreign war. When the State of Tamaulipas came under the firm control of the Government, during the war with Mexico, it was determined that, *as regards all other nations,* it was a part of the United States, and belonged to them as much as the territory included in their established boundaries. (Fleming *v.* Page, 9 How., 603.)

The application of this principle in the decision of *The Prize Cases*, (2 Black,) and the more recent application of it in the case of *Thorington* v. *Smith*, (8 Wall., 10,) where the Court define the Confederate Government, even as respects citizens of the United States, within its jurisdiction, as a *de facto* Government, are familiar to this tribunal.

(*b*) When, therefore, in the progress of a revolutionary rebellion, the authority of an established Government has been suspended in a definite part of its territory, and the insurgent power has succeeded in substituting a *de facto* Government of its own, excluding the former Government from all power and control, the revolted community becomes invested, so far as foreign States in their relations with the insurgent territory are concerned, with the status of *de facto* sovereignty, and entitled to exercise the right of empire within its territorial limits.

"Sovereignty," says Mr. Hall, "is the status of a society which has the exclusive *power* of making and enforcing laws within the territory occupied by it, and which is subject to no control in its relations with other societies. (The Rights and Duties of Neutrals, p. 15.)

Professor Bernard (British Neutrality, p. 107) has presented an admirable statement of the juridical idea involved in the term "sovereignty." He says:

"By a sovereign State, we mean a community or number of persons permanently organized under a sovereign Government of their own; and by a sovereign Government, we mean a Government, however constituted, which exercises the power of making and enforcing law within a community, and is not itself subject to any superior Government. These two factors—one positive, the other negative: the exercise of power and the absence of superior control—compose the nature of sovereignty, and are essential to it. The question, whether a given community is a sovereign State? and the question, who is or are sovereign in a given community? are thus, properly speaking, pure questions of *fact*. A revolted community seldom succeeds in establishing a Government and achieving independence at a blow; and some time must usually elapse before it can be safely and prudently recognized as independent by other nations. There is commonly a period of transition and struggle, until the expiration of which it is uncertain whether the old state of things will be reëstablished or not. During the period the sovereignty of the original Government over its refractory subjects has really ceased to exist,—for *power which cannot be exercised is not power*,—there remains only the hope or expectation that it will be restored, coupled in the minds of its adherents with the opinion that it *ought* to be restored, an opinion which is expressed by the phrase 'sovereignty *de jure*.' A *de jure* Government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* Government is one which is really in possession of them, although the possession may be wrongful or precarious."

It is upon this principle that foreign nations and their subjects must accept the law of the territory as dictated by the *de facto* Government, and that the *de jure* Government

has no international right to affect them by any attempted exertion of its municipal authority.

Governments and publicists accordingly deny the international right of the *de jure* Government, in time of civil war, to close the ports in the firm possession of the insurgent power against the commerce of foreign nations.

"For this, on principle," says Mr. Lawrence, "the most obvious reason exists. The waters adjacent to the coasts of a country are deemed within its jurisdictional limits only because they can be commanded from the shore. It thence follows that whenever the dominion over the land is lost, by passing under the control of another power, whether in foreign war or civil war, the sovereignty over the waters capable of being controlled from the land likewise ceases." (Lawrence's Wheaton, p. 846, note 241.)

(*c.*) When the actual situation, in the case of a territorial rebellion, presents, however, not only this element of an organized *de facto* Government in the full exercise of complete sovereignty over the territory and ports under its control, but also the further element of the actual and mutual exercise of belligerent powers by both the contending parties, conformably to the rules of public law, it is manifest that the contest must be regarded and treated by friendly foreign nations affected by the hostilities as having the juridical incidents and consequences of an international war—as, under the public law, what it is in fact, a war between belligerent powers.

This will be apparent upon a consideration of the rights of foreign States and the parent Government, in the actual situation of affairs in such a contest.

It is manifest that foreign States cannot be denied the right to continue their commercial intercourse with the revolted community.

Commerce is a right of natural society, and if a State is disrupted by civil war, it is her misfortune that her authority is excluded from a portion of her territory, and that the

natural right of commerce which foreign nations are entitled to enjoy, may be exercised for the benefit of her insurgent enemies. Nations may and must live, and they often live by trade and intercourse with all accessible portions of the world; and they cannot be required to starve while States quarrel, whether with other nations, or with their own subjects. Nor has the parent Government, as we have already seen, the right to exercise what Mr. Dana has termed *municipal surveillance* over the ports in the firm possession of the insurgent power, and close them against foreign commerce by a municipal statute or ordinance. While the right of a nation to close a port to foreign commerce for reasons of internal safety, in good faith, with no purpose hostile to friendly nations, and while it has jurisdiction *de facto*, (as in the case of riot or unorganized insurrection,) cannot be questioned, it is equally unquestionable that where, in a civil war, a port is in the possession of an organized hostile body politic, foreign nations have a right to regard the revolted community as invested with the sovereignty of the territory, and to treat the parent Government as without authority to close the port by municipal interdict against the commerce of their subjects.

Under such circumstances, therefore, unless the ancient Government is able to exert the *powers and rights of war* against the revolted community,—to prosecute hostilities against the insurgents upon the footing of international war,—the rights of foreign nations, in their intercourse with the insurgent territory, cannot be affected, and the parent Government will be obliged to suffer the inconvenience and the detriment necessarily incident to this unrestricted freedom of commerce with its insurgent enemies.

The public law permits a Government, in this situation, from the necessities of the case, to treat the contest as if it were a foreign war, and to exercise the rights which war gives to public enemies against each other—such as the right of blockade, and of capturing contraband and enemies' property. The parent Government may acknowledge the fact that the insurrection has reached the dimensions of

an actual war, and when it does so, friendly States must respect its exercise of those exceptional rights and powers which spring from a state of war between sovereign States.

Such public acknowledgment may be made by the institution and notification of a *maritime blockade* of the insurgent's coasts and ports, and the exercise of the rights of search and capture on the high seas. This Court, in the early *Prize Cases*, (2 Black., 670,) held that a Proclamation of intended blockade of revolted ports was *conclusive* evidence that a *state of war* existed, which demanded and authorized recourse to such a measure. Blockade is at once an act and incident of war. But if foreign nations, when such acknowledgment is made of the existence of a state of war, are bound to respect the parent Government in the exercise of belligerent rights, they are bound (unless, indeed, they become the *allies* of the parent Government in the war) to allow equally to the insurgent power the free exercise of the same rights. If the contest is a war, foreign nations who profess neutrality must suffer their merchant ships to be forcibly stopped and searched on the high seas, and the property of their subjects to be captured and brought in for adjudication, by the commissioned cruisers of the parent Government, and confiscated by its prize tribunals for acts which, in the absence of war, would be valid and lawful under the law of nations. If there is no war, all such interferences with foreign property are maritime torts, which foreign nations will never endure or tolerate. When they concede to the parent Government the right to exercise belligerent powers against them, they must allow to the insurgent community the exercise of the same powers; that is to say, they must recognize the belligerent status and rights of the insurgent organization in the hostilities, and in doing so, they do but follow the determination which the parent Government itself has made as to the character of the contest and of its adversary. As in every war there must be, at least, two belligerent parties, the parent Government, by acknowledging, through its public acts, the fact that the contest is and can only be met as a war, itself admits the

belligerent character of its adversary; and the duty of impartial neutrality, which is incumbent upon friendly foreign States, requires them to deem and treat each party, in the language of Judge Story, as "a belligerent *nation*, having, so far as concerns them, the *sovereign rights of war*, and entitled to be respected in the exercise of those rights." (The Santissima Trinidad, 2 Wh., 337.)

Our own jurist, Mr. Wheaton, lays down the doctrine in these words:

"Until the revolution is consummated, whilst the civil war involving a contest for the Government continues, other States may remain indifferent spectators of the controversy, still continuing to treat the ancient Government as sovereign, and the Government *de facto* as a society, *entitled to the rights of war against its enemy;* or may espouse the cause of the party which they believe to have justice on its side. In the first case, the foreign State fulfills all its obligations under the law of nations, and neither party has any right to complain, provided it maintains an impartial neutrality. If the foreign State professes neutrality, it is *bound* to allow impartially to *both* belligerent parties the *free exercise of those rights which war gives to public enemies against each other*, such as the rights of blockade, and of capturing contraband and enemy's property." (Wheaton's Int. Law, sec. 23.)

The English publicists have adopted Mr. Wheaton's text as a correct statement of the public law on this subject.

Professor Twiss has the following commentary:

"If a state of war exists between a government *de jure* and a government *de facto* of any country, foreign Powers are entitled to remain indifferent spectators of the contest, and to allow impartially to *both* belligerent parties the free exercise of those rights which war gives to public enemies against each other, such as the right of blockade, the right of capturing contraband of war and enemy's property laden in neutral vessels. A government *de jure* may notify to foreign Powers that there is an insurrection against it, whereby its laws within its territory are not executed, and that it has deemed it advisable to have recourse to measures of war against the insurgents by setting on foot a blockade

of the ports in their occupation, or otherwise, and by enforcing such blockade, pursuant to the law of nations. Such a notification imposes at once upon a foreign nation the necessity of deciding upon one out of three alternative courses of action: It may *assist* the government *de jure*, or it may *assist* the insurgents—in either of which cases it becomes a party to the war; or it may remain *impartial*, still continuing to treat the government *de jure* as an independent power, while it treats the insurgents as a community entitled to the *rights of war* against its adversary. *It is obviously impossible for a neutral power to recognize the character of one party as a belligerent without acknowledging the belligerent character of its adversary.* * * * A foreign nation is not concerned with the justice or injustice of the war, and it is not for it, if it wishes to remain neutral, to judge between the parties to the war, and to grant or refuse more or less to the one or the other, as it thinks its cause to be more or less just. A nation, therefore, which wishes to be neutral in such a war, must acquiesce in either party exercising the rights of a belligerent in regard to all foreign nations; for it cannot concede the exercise of those rights to one party and refuse it to the other without interfering in the war." (Twiss' Law of Nations, War, sec. 239.)

(*d*) As foreign nations, in a civil war, are bound by all the *duties* which affect neutral States in an international war, so they are entitled to exercise all the *rights* which belong to neutral States in an international war. If the *contending parties*, in a civil war, may exercise the rights in respect to *neutrals*, which pertain to lawful belligerents in an international war, it must follow, in the nature of things, that *neutrals*, in a civil war, may lawfully exercise in respect to the *belligerents* all the rights which belong to neutrals in an international war.

We have seen that neutral nations are obliged to suffer the belligerents, in a civil war, to exercise the rights of maritime capture which belong to sovereign States in foreign wars; and it would be absurd to suppose that neutral nations were bound to suffer the commerce of their subjects on the ocean to be vexed by a Government compelled to resort to belligerent rights, under the law of nations, to overcome its revolted citizens, unless their subjects were

entitled to exercise all the rights of neutrals under the law of nations.

3. If we have been successful in the foregoing argument, we have shown that when the Government of the Confederate States acquired, as it did acquire, by the acknowledgment of the Government of the United States, and the recognition of all other countries, the status of a belligerent, the hostilities were affected with all the incidents, so far as foreign States and their subjects were concerned, which attach to public war as respects the relative rights and duties of belligerents and neutrals.

That no distinction whatever is to be drawn between a community which has been recognized as a sovereign State and one which has not been recognized as sovereign, but has been recognized as a belligerent, as to the extent of their respective belligerent rights and privileges, (and, therefore, as to the extent of neutral rights,) under the law of nations, may be considered as having been adjudged by the Tribunal of Arbitration at Geneva, in reference to the objections urged by the United States to the treatment received by the Confederate commissioned cruisers in British ports, based upon the ground that they were not the commissioned ships of a recognized power. The objections were not sustained by the arbitrators.

Count Sclopis, the President of the Tribunal, expressly declared that there was no difference between the public ships of a recognized and sovereign nation and the ships belonging to a belligerent power whose sovereignty has not been recognized, in regard to their rights of hospitality in neutral ports. The status of belligerents having been accorded to both parties, they were both entitled to enjoy equally all the rights and privileges of belligerency under the public law. (Opinion of Count Sclopis, Geneva Arbitration Papers, vol. 4, p. 72.)

Mr. Dana, in his valuable note on the *Recognition of Belligerency*, (Wheaton, p. 37,) has stated with great clearness the international consequences of the recognition of the

belligerency of insurgents in a civil war, and the principal *jura belli* to which the respective parties are entitled under the law of nations. He says:

"The recognition of belligerent rights is not solely to the advantage of the insurgents. They gain the great advantage of a recognized *status*, and the opportunity to employ commissioned cruisers at sea, and to exert all the powers known to maritime warfare, with the sanction of foreign nations. *They can obtain abroad loans, military and naval materials, and enlist men, as against everything but neutrality laws; their flag and commissions are acknowledged, their revenue laws are respected, and they acquire a quasi-political recognition.*

"On the other hand, the parent Government is relieved from the responsibility for acts done in the insurgent territory; its blockade of its own ports is respected; and it acquires a right to exert, against neutral commerce, all the powers of a party to a maritime war."

The declaration of Grotius, as to such a case of civil war, is, therefore, strictly true, so far as foreign States are concerned: "*In hoc eventu,*" he says, "*gens una pro tempore quasi duae gentes habitur.*" (Lib. 11, b. 18, 2.)

Although foreign Governments will abstain from official intercourse with the *de facto* Government, as long as the issue of the contest is doubtful, they are not obliged, as Mr. Dana has shown, to ignore its existence, and, when it is necessary for the interests of their subjects, they are at liberty to deal with its authorities as with those of other Governments.

Mr. Dana (Wh., p. 41) states:

"It is purely an internal matter whether a community, previously one, shall divide itself by force or by agreement, and become two or more States. When that matter is settled, foreign nations will recognize it as a fact.

"It would be a wrong view, and lead to false results, if we assumed that the foreign State is to recognize everything possible in the new State, once for all, or to recognize nothing. We have seen that its own necessities may require it to recognize belligerent rights in the insurgent Government. Another stage may require it to treat with that Government

with reference to its *de facto* revenue and commercial regulations, and the rights of foreign subjects, in their persons or property, being within the territory under the control of that Government, or for reparation for past and prevention of future wrongs.* If the necessities of the foreign State require these acts to be done, the parent Government has no cause of complaint. It is her misfortune that the insurrection has dimensions and power which exclude her authority for the time, and compel foreign nations to deal with an intruding Government that has authority *de facto*.

"The cardinal rule is, that while they must not interfere to affect the contest, foreign nations *may and must live, notwithstanding the contest*. When the necessities of the foreign State are spoken of, the term is to be understood in a liberal sense. It refers to a state of things when a just regard to the duties and rights of a Government in reference to the interests confided to it requires its action.

"*It is among the duties of a Government to keep open to its subjects commercial intercourse with all practicable parts of the world, the privileges of travel and sojourning, and all the forms of intercourse beneficial to humanity; and to make arrangements for the protection of its citizens in these pursuits.* To that end, among the frequent convulsions of States, it is often necessary for a foreign Power to deal with the party in possession of a portion of the State. To wait till the question of right is determined, would be to suspend no small part of the life of nations."

4. It follows from these premises, that all commerce between citizens or subjects of neutral States, and the Confederate States, carried on *within neutral territory*, or upon the *high seas*, or *within the territory of the Confederate States*, was as valid, under the public law, as like commerce on the part of neutrals with the United States. The commerce of neutrals was carried on under the protection of the law of nations, and was subject to be interfered with by the United States only in the due and lawful exercise of their belliq-

*Sir W. Harcourt says:

"The recognition of the insurgents as belligerents gives them quite a sufficient personality to enable foreign Powers to address to them remonstrance, and to receive at their hands satisfaction. A Government which is sufficiently incorporated to enjoy the rights of a belligerent, cannot be suffered to evade the correlative duties which are incumbent upon it." (Letters of Historicus on International Law, p. 13.)

erent rights under the public law. The only *duties* which foreign States were bound to observe towards the United States, were the duties of impartial neutrality in the contest. The only *rights* which the United States could exercise against neutral subjects and their commerce, were the rights of belligerency under the laws of nations.

III.

Municipal Interference with Neutral Trade in Civil War.

The history of public law presents abundant illustrations of the principles just stated, and shows that neutral nations have not tolerated the idea that the rights of their subjects in civil wars were different in any respect from their rights in international wars; or that a Government prosecuting hostilities in a civil war against belligerent insurgents, could interfere with or affect the commerce of neutrals otherwise than in accordance with the principles and rules of international law applicable to foreign wars; or that the parent Government, in a civil war, was to be regarded as having any municipal jurisdiction or sovereignty over the territory in the possession of the insurgent Government, by virtue of which it could prohibit the citizens or subjects of neutral countries from carrying on commerce with that territory, or enforce any such prohibition directly or indirectly against neutrals, during the period of hostilities, or after it has succeeded in restoring its authority over the revolted community.

1. The action of the Government of the United States, with regard to the commerce and intercourse of the citizens or subjects of neutral countries with the insurgent States, in the late civil war, was strictly within the limits of its international rights and duty, and strictly in conformity to the doctrines which American statesmen, in other civil wars where the United States were neutrals, had largely contributed to place in the Code of International Law.

The Government of the United States never attempted,

during the war, to prohibit commerce between foreign countries and the insurgent States, or to affect it by any *municipal legislation;* and it relied, as it was bound to do, exclusively upon its belligerent rights under the public law in regard to such commerce.

Congress, by the Non-Intercourse Act of July 13, 1861, (12 Stats., 256,) purported to authorize the President to close, by proclamation, the ports of the insurgent States against foreign commerce; and purported to declare any vessel and its cargo forfeited, which should attempt to enter such port after it should be so closed.

The attempted execution of the statute would have been in violation of the international rights of foreign nations, and in disregard of every doctrine of public law ever advocated by the United States, and accordingly no attempt was made by the Government to put it into operation against the commerce of neutrals; but it established and maintained a maritime blockade avowedly "*in pursuance of the law of nations;*" and by the application alone of the established principles of international law in regard to blockade and contraband, was the commerce of neutrals with the revolted States interfered with by the United States during the period of hostilities.

The British Government, on information of the probable passage of the statute of 1861, at once and unequivocally declared that it would not recognize the right of the United States to close those ports by any municipal ordinance; and that the only measure by which general neutral trade with such ports could lawfully be affected was a belligerent blockade under the law of nations.

Earl Russell, writing to Lord Lyons on July 19, 1861, said:

"Her Majesty's Government admit that a civil war exists; they admit that whether the Confederate States of the South be sovereign and independent or not, is the very point to be decided; but Her Majesty's Government affirm, as the United States Government affirmed in the case of the South American provinces, that the existence of the civil

war gives to both parties the rights of war against each other. Arguing from these premises, it is impossible for Her Majesty's Government to admit that the President or Congress of the United States can, at one and the same time, exercise the belligerent right of blockade and the municipal right of closing the ports of the South. In the present case, Her Majesty's Government do not intend to dispute the right of blockade with regard to ports in the possession of the Confederate States; but an assumed right to close any ports in the hands of insurgents would imply a right to stop vessels on the high seas without instituting an effective blockade. This would be a manifest evasion of the necessity of blockade, in order to close an enemy's port. Neutral vessels would be excluded, when no force exists in the neighborhood sufficient to carry that exclusion into effect. Maritime nations would not submit to this excess, under the pretence of the rights of sovereignty. Whether, indeed, the United States treat the Southern prisoners in their hands as enemies or prisoners of war, is not a matter in which foreign countries can properly interfere. But Her Majesty's Government cannot allow the Queen's subjects to be deprived of any of the rights of neutrals. They would consider a decree closing the ports of the South, actually in the possession of the insurgent or Confederate States, as null and void, and they would not submit to measures taken on the high seas in pursuance of such decree." (Lord Russell to Lord Lyons, July 19, 1861, Parliamentary Papers 1862, N. A., No. 1. pp. 72, 47.)

The British Government, a short time before invoking these settled principles of public law against the rights of this Government to enact a municipal prohibition of trade on the part of foreign nations with the Southern ports, had determined to enforce them in the case of the civil war which was then being waged in the Republic of New Granada against an order of the Government of that Republic, declaring certain ports in the control of the insurgent power closed to foreign commerce.

Her Majesty's Government, while admitting the right of the Government of New Granada to blockade the ports in the possession of its insurgents, directed Admiral Milne, the naval commander on that station, to disregard any

decree of that Government closing the ports against British commerce.

Lord Russell, in response to an inquiry in the House of Commons on the 27th of June, 1861, as to whether Her Majesty's Government recognized the notification given by Señor Martin, the Minister of New Granada, announcing the closing of the ports of Rio Hacha, Santa Marta, Savanilla, Carthagena, and Laporte, said:

"The Government of New Granada has announced, not a blockade, but that certain ports of New Granada are to be closed. The opinion of Her Majesty's Government, after taking legal advice, is that it is perfectly competent to the Government of a country, in a state of tranquility, to say which ports shall be open to trade, and which shall be closed; but in the event of insurrection, or civil war, in that country, it is not competent for its Government to close the ports that are *de facto* in the hands of the insurgents, as that would be a violation of international law with regard to blockade. Admiral Milne, acting on instructions from Her Majesty's Government, has ordered the commanders of Her Majesty's ships not to recognize the closing of their ports." (Mr. Seward to Mr. Adams, July 21, 1861, quoting the speech of Lord John Russell, Message and Documents, 1861–'62, p. 117.)

2. The doctrines of neutral rights thus asserted by Great Britain in reference to the civil wars in the United States and New Granada, were those upon which the Government of the United States based its resistance to the attempts on the part of Spain, during the contests with her revolted colonies in America, to enforce against neutrals the restrictions and penalties imposed by her municipal laws, which had previously secured her the monopoly of the colonial trade, and to interfere on the high seas with neutral commerce, without effective blockade of the ports in the firm possession of the insurgent Governments.

The claim of Spain, that she had a right to enforce against neutrals her prohibitory laws of colonial monopoly, upon the pretense that the revolted colonies were still subject to her sovereign power of municipal legislation, was

repudiated and denied throughout the contest by the Government of the United States.

The diplomatic correspondence in reference to this claim of Spain is quite fully presented by Mr. Lawrence. (Wheaton, note 241, pp. 846, 847.)

Mr. Monroe, in a note of the 20th of March, 1816, to Señor Onis, the Spanish Minister to the United States, having objected to the pretended blockade of the Spanish-American coast, Señor Onis replied that the coast *belonged* to the Spanish Monarchy, and "consequently any vessel whatever found near it, or standing toward it, can have no other object than to carry on smuggling, or stir a civil war in the King's dominion: in either case the law of nations recognized the seizure of the vessel so employed." (American State Papers, vol. IV, p. 156.)

Mr. Erving, the American Minister at Madrid, was instructed by Mr. Monroe to express the firm dissent of this Government from these views; and accordingly, on September 26, 1816, he declared to the Minister of Foreign Affairs of Spain that a blockade of the insurgent coast, "to be acknowledged as valid by the United States, must be confined to particular ports, each having a force stationed before it sufficient to intercept the entry of vessels, and no vessel shall be seized, even in attempting to enter a port so blockaded, till she has been previously warned away from that port."

The subject was renewed by Mr. Adams, in his instructions of the 28th of April, 1826, to Mr. Nelson, our Minister to Spain; and he distinctly repudiated the doctrine that the commerce of neutrals with the insurgent colonies was liable to be interfered with by Spain, by virtue of her ancient sovereignty. Mr. Adams said:

"M. Anduaga (Spanish Minister) attempts, by laborious arguments, to maintain, to the fullest and most unqualified extent, the right of the Spanish privateers to capture, and of the Spanish Prize Courts to condemn, all vessels of every nation, trading with any of the ports of the Independent patriots of South America, because, under the old colonial

laws of Spain, that trade had been prohibited. And, with the consistency of candor at least, he explicitly says that the decrees issued by the Spanish commanders on the Main, under the name of blockades, were not properly so called, but were mere enforcements of the antediluvial colonial exclusions. *It is in vain for Spain to pretend that during the existence of a civil war, in which, by the universal law of nations, both parties have equal rights with reference to foreign nations, she can enforce against all neutrals, by the seizure and condemnation of their property, the law of colonial monopoly and prohibition by which they had been excluded from commercial intercourse with the colonies before the existence of the war, and when her possession and authority were alike undisputed.* * * * * * *

"You will represent to the Spanish Government the claims of all the citizens of the United States, whose vessels and other property have been captured by the privateers from Porto Rico and Porto Cabello, and condemned by the courts of those places for supposed breaches of the pretended blockade, or for *trading* with the South American Independents."

(Cong. Doc. accompanying President's Message, December, 1824, pp. 269–285.)

During the Presidency of Mr. Buchanan a controversy arose with Peru, growing out of the seizure and confiscation of two American vessels, called "*The Georgiana*" and "*The Lizzie Thompson*," for trading in guano at places in the possession of a revolutionary government, in violation of the laws of Peru. The Government of the United States, applying the doctrines which have just been referred to, intervened on behalf of the owners of the vessels, and maintained that they had a right, under the law of nations, to recognize the authority of the government *de facto* in possession of the place, and that they could not lawfully be punished, or affected in any manner, by the Peruvian authorities after their power had been restored.

The questions of international law in the case were referred by Secretary Cass to Attorney-General Black, who held that the laws and jurisdiction of the Peruvian Government were suspended at Iquique during the time it was in the possession of its domestic enemies, and the resumption

of possession "*gave it no power to punish American citizens for a supposed violation of its laws while they were suspended, or to make any new law which would have a retroactive effect.*"

The Attorney-General said:

"When a portion of the territory of one nation is taken possession of by the forces of another, with which it is at war, the conquering party has an undoubted right to declare the law of the place so long as its occupation of it continues; and all rights of the previous sovereign are suspended until his possession is resumed. It may be supposed that these principles refer only to a lawful war carried on between two separate and independent nations. But we shall see that they apply with equal force to a conflict like that in which Peru has been engaged.

"When the people of a Republic are divided into two hostile parties, who take up arms and oppose one another by military force,—this is civil war. The fact that civil war exists does not depend in the least on the cause of the dispute. No foreign nation has a right to interfere between the parties, or to judge of the merits of the quarrel, unless with the purpose of making war upon one or the other. They have appealed to the sword, and the sword must decide it. Other powers are bound to observe a strict and impartial neutrality. If the party which opposes the previously-established Government succeeds in overthrowing it entirely and gets possession of the whole country, nobody can be perverse enough to deny that, in such a case, the new Government is sovereign, and authorized to dictate the law which shall prevail. Supposing, however, the rebellion is but partially successful, and the old Government maintains itself in one part of its territory while it is obliged to surrender another, shall it then give law where it has no power to enforce obedience, or shall its authority be confined to the territory which it occupies? The answer to this question is not doubtful. A revolutionary party, like a foreign belligerent, is supreme over the country it conquers as far and as long as its arms can carry and maintain it. * * *

"On the whole case, my opinion is that the following propositions cannot be controverted with any show of reason or authority:

"1. At the time when the *Georgiana* and *Lizzie Thompson* went to Iquique, a state of civil war existed in Peru.

"2. At that time one of the parties to that civil war, having expelled the other, had possession, by conquest, of

the port of Iquique, and the points where the guano was deposited.

"3. Being so in possession, and having officered and organized the local government of the port and the city, and the guano deposits, the jurisdiction of the party headed by Viranco was perfect, and an American vessel trading to the port was bound to conform to its decrees.

"4. The *Georgiana* and *Lizzie Thompson* having obeyed the laws of the place then established, and having acted in pursuance of licenses given by the officers in authority, were guilty of nothing for which the other party to the civil war could punish or molest them afterwards.

"5. The laws and jurisdiction of the Peruvian Government were superseded at Iquique during the time that place was in possession of its domestic enemy, and its resumption of possession—supposing possession to have been resumed—gave it no power to punish American citizens for a supposed violation of its laws while they were suspended, nor to make any new law which would have a retroactive effect." (9 Opinions of Attorneys-General, 143.)

These views were adopted by Secretary Cass, and the Peruvian Government was informed that they expressed the doctrines of public law maintained by the United States. (Lawrence's Wheaton, p. 575, note 180.)

3. The United States have always claimed that as they were bound to observe toward each party in a civil war all the duties which flow from the status of *neutrality*, so each party in such a contest was affected by all the duties toward them which arise from the status of belligerency, and thus obliged to concede to them, and their citizens, the exercise of all the *rights* which belong to the status of neutrality under the public law. That the juridical incidents of a civil war as respects the rights of belligerents and neutrals are the same as those of an international or foreign war, may be affirmed, therefore, to be the traditionary doctrine of the Government of the United States.

It was upheld and maintained by all Departments of the Government during the long contest between Spain and her revolted colonies in America.

After the recognition of the belligerency of the Spanish-

American States by the Executive Department of the Government, this Court, in a series of celebrated decisions, and speaking by those great masters of public jurisprudence, Chief-Justice Marshall and Judge Story, declared the doctrine that each party in that contest possessed, so far as concerned the United States, the sovereign rights of war, and was entitled to be respected in the exercise of those rights.

"We cannot interfere," said Mr. Justice Story, "to the prejudice of either belligerent without making ourselves a party to the contest, and departing from the posture of neutrality. *All captures made by such must be considered as having the same validity, and all the immunities which may be claimed by public ships in our ports, under the law of nations, must be considered as equally the rights of each, and as such must be recognized by our courts of justice until Congress shall prescribe a different rule. This is the doctrine heretofore asserted by this Court, and we see no reason to depart from it.*" (The Santissima Trinidad, 7 Wh., 337; U. S. *v.* Palmer, 3 Wh., 610; The Divina Pastora, 4 Wh., 52; The Estrella, 4 Wh., 302; The Neuestra Sonora de la Caridad, 4 Wh., 497.)

So, when the Executive Department of the Government came to define the *neutral rights* of the United States against Spain, in that contest, it maintained, as we have seen, that citizens of the United States were entitled to exercise perfect freedom of commerce with the revolted colonies, subject only to the application on the high seas of the belligerent rights of Spain under the laws of nations, and the rights of those citizens in regard to the colonial trade could not be modified or affected in any way by the Spanish Government by any exertion of its supposed municipal sovereignty over the revolted colonies.

The same course was pursued by the United States in the case of the Texas rebellion, which was recognized by the President as a civil war, in November, 1835, by giving notice to the Mexican Government of his intention to maintain the neutrality of the United States.

In the month of April, 1836, an American vessel, *The Packet*, was captured by the armed schooner *Invincible*, sailing under the flag of the Republic of Texas, for carrying contraband of war for the use of the Mexican army. The *Invincible* was thereupon seized by a United States frigate and brought to New Orleans; and upon the question, whether the officers and men of the *Invincible* were liable to indictment for piracy, the Attorney-General, Mr. Butler, advised the President that the case was one of belligerent capture under the law of nations, and must be respected as such by the United States as a neutral power.

Mr. Butler said:

"Where a civil war breaks out in a foreign nation, and part of such nation erect a distinct and separate Government, and the United States, though they do not recognize the independence of the new Government, do yet recognize the existence of a civil war, our courts have uniformly regarded each party as a belligerent nation, in regard to acts done *jure belli*. The existence of civil war between the people of Texas and the authorities and people of the other Mexican States, was recognized by the President of the United States at an early day in the month of November last. Official notice of this fact, and of the President's intention to preserve the neutrality of the United States, was soon after given to the Mexican Government. This recognition has been since repeated by numerous acts of the Executive, several of which had taken place before the capture of the *The Packet*. On the assumption that the actors were aliens, the case is, therefore, brought within the principle stated, and the charge of piracy cannot be sustained."

4. The rule of neutral right and duty, under the public law, in a civil as in an international war, consists, as said by Sir William Scott, in observing perfect *indifference* between the contending parties. "The high privileges of a neutral," said the great magistrate of nations, "are forfeited by the abandonment of that *perfect indifference* between the contending parties in which the *essence* of neutrality consists." (*The Eliza Ann*, 1 Dodson, 244.) If an established Government, in a civil war, is allowed to provide itself with

materials of war within neutral territory, the insurgent power must be accorded the same right A neutral State cannot, therefore, permit trade to be carried on within and from its territory with a recognized Government, in contraband of war, or any other merchandise, without allowing the same trade to be carried on with the unrecognized but belligerent Government. If free trade in contraband of war is allowed with the parent State, neutral subjects have the *right* to conduct the same trade with the other belligerent nation; and the parent State cannot complain if they exercise this right, and cannot interfere with the commerce, except by the lawful exercise of its own belligerent rights.

The right of neutral subjects to carry on the same trade with insurgent belligerents that they carry on with the other party to the war, thus arises out of the principle of international neutrality. Thus, (to apply the principle,) if British subjects might lawfully trade with the United States during the civil war, in contraband of war, (as no one can doubt they might and did,) they had the right to carry on the same trade with the Confederate States; and the British Government would have violated its neutral duty if it had interfered with any trade with the Confederate States which it allowed to be carried on with the United States. Nor would it have been consistent with the neutral duty of Great Britain to have prohibited contraband trade with *both* parties, if the prohibition would have operated, as it undoubtedly would have done, to the prejudice of the Confederate States.

Sir Travers Twiss well states:

"Circumstances may occur, in a period of general peace, which will warrant a State in prohibiting the exportation of any warlike stores from her ports; as, for instance, if she have reason to expect that she may herself be soon involved in war. And considerations of a like nature may equally warrant a State in prohibiting the exportation of any warlike stores from her ports at a time when war exists between other States. No neutral State is responsible to any belligerent State for measures which she feels called upon to adopt for her own security within the limits of her

own sovereignty. On the other hand, it is the privilege of every neutral nation, as such, to maintain relations of peace with both belligerents, and either belligerent may justly expect that a *neutral nation will not prohibit any trade with its ports, whenever such trade would clearly work a greater prejudice to one belligerent than to the other, and so be indirectly an act of favor to the other.* It is a less questionable act, therefore, for a neutral Power to allow its markets to be open equally to the subjects of both belligerent Powers, than to prohibit to both parties the exportation of provisions, or ammunition, or arms, or ships, or any other article available for belligerent purposes. *A nation may, indeed, in appearance, act with impartiality in issuing and enforcing such prohibitions, whilst in substance it may be favoring the one party more than the other.*" (Law of Nations, War, sec. 230.)

IV.

The General Doctrines of Public Law as to Rights of Commerce in Time of War.

The juridical incidents of a Civil War, according to the theory of the public law, and the opinion and practice of nations, being the same as those of an International War, with respect to the relative rights of belligerents and neutrals, it becomes important to understand precisely what are the rights of neutrals in respect to the belligerents, and the rights of belligerents in respect to neutrals, under the law of nations, touching the matter of Intercourse and Commerce between neutral and belligerent communities in time of war.

1. A neutral State may be defined to be a State which remains at *peace* with two other States which are at war with one another, and renders assistance to neither.

The public law, however, draws a broad distinction between a State in its collective or organic capacity, and as represented by its Government, and the individual citizens or subjects of which it is composed, and between their respective relations to the belligerent communities, by dis-

tinguishing fundamentally between the rights of the *Government* and the rights of the *citizens* or *subjects* of the neutral State, in reference to the belligerent communities. While the neutral *State*, as represented by its *Government*, cannot, directly or indirectly, furnish aid to either belligerent, its *individual members* are entitled to exercise all the rights which pertain to their relations of intercourse and trade with the belligerent communities, notwithstanding they may thereby afford very material assistance to one, or other, or both, of the belligerents in carrying on the war.

The rule of neutral duty requires the *Government* of a neutral State to refrain from furnishing to either belligerent troops, arms, munitions, ships, horses, money, or any other supplies or articles which may be useful to it in carrying on war, and to prevent, if possible, by the exercise of proper diligence, its subjects, or the agents of a belligerent within its jurisdiction, from giving assistance to a belligerent, when such *assistance assumes the form and character of a military array;* but that rule does not require its *citizens* or *subjects* to refrain from supplying, or require the neutral Government to prevent them from supplying, a belligerent with any articles which either by their own nature, or from some peculiar need on the part of the belligerent, may be of special use in the conduct of hostilities. The public law imposes no restrictions upon the commercial relations subsisting between the citizens or subjects of neutral States and the belligerent communities, nor does it prohibit the former from exercising the rights incident to those relations. If the neutral Government does no act in aid of a belligerent, and uses due diligence to prevent any abuse of its territory, or violation of its sovereignty, for belligerent purposes, it fulfills its entire obligation under the law of nations; and its citizens or subjects may be left free to pursue their ordinary avocations of trade and commerce with the belligerent territory in such commodities, and to such extent, as they may find profitable or convenient under the circumstances of the war.

2. Nor does the public law impose directly upon the members of the neutral State any duty or obligation to discontinue their relations with the belligerent communities, or the exercise of their rights of intercourse and commerce with them, as they existed before the war, or as they would exist independently of the war. Neutral subjects owe no duty to the belligerent States. The public law recognizes no relations between a State and the subjects of another State. The only duty of a citizen or subject of a State is to his own Government. He is and can be bound by no duty or obligation to either of the belligerent Governments. While it is the duty of the individual members of a State to refrain from acts which compromise the neutrality of their Government, it is a duty they owe to their own Government, and for any breach of such duty their own Government can *alone* hold them responsible. The belligerent States cannot punish them, or affect them in any manner, for any breach of their duty to their own Government, without usurping a power not conferred by the law of nations, and committing an offense against the neutral State. The situation, relations, and rights of neutrals are, therefore, the very *reverse* of those of the citizens or subjects of a belligerent Government. The latter are forbidden from holding any intercourse or having any commerce whatever, unless with the permission of the sovereign, with the other belligerent. "The whole nation is embarked in one common bottom, and must be reconciled to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because he is the enemy of his country." (*The Rapid*, 8 Cranch, 155.) It is, therefore, illegal for any person owing allegiance to a Government to engage in commercial intercourse of any kind with its enemies. He thereby commits a crime against his Government, which may be treason, or a misdemeanor, as the enemy is, or is not, furnished with intelligence or supplies which may be useful in war. (2 Ro. Abr., 173; Guerre L. Pl., 3; 12 St. T., 799, 809; 25 St. T., 1426;

1 D. & E., 85; 8 D. & E., 550; 1 Rob., 202, 203; 3 Wash. C. C., 183.)

But the neutral subject owes no allegiance and has no duty to either belligerent, and has no interest or concern in his good or bad fortune in the war. He is embarked in no contest with either belligerent. It is not his quarrel, or that of his Government. He is not the enemy, or required to be, of either belligerent State, or any of its members. He has no *jus bellicum*, and is, therefore, entitled to the continuance of his ordinary *jus pacis*, notwithstanding the state of war between other nations. (3 Phill. Int. Law, sec. 140.)

No criminality or illegality can, therefore, be imputed to neutrals in carrying on their commercial intercourse with the belligerents; and there is no reason why they should discontinue or refrain from it in a war in which they have no concern.

If contraband trade, or trade with a blockaded port, were *illegal*,—*i. e.*, if it were a violation of neutrality, and therefore an infringement of the law of nations,—it would be incumbent on the neutral Government to interfere to prevent it; but that it is not required to prevent it, or attempt to prevent it, is one of the settled principles of the modern public law. The fact that, by the general consent of nations and Governments, a neutral State is not obliged to interfere with any trade of its citizens or subjects, whether in contraband of war or with a blockaded port, shows that such trade is not prohibited by the Code of International Law, and is, therefore, not illegal under that Code.

The distinction between *State acts* and acts of the *members of a State*, and the doctrine that trade between neutral individuals and a belligerent is *not* in contravention of the public law, which were first expounded at length by Vattel, are now the settled law of the public jurisprudence of England and the United States. They are treated by all the great authorities as fixed principles of international law; and to the decisions of this Court is, perhaps, due more than to any other influence, the general acceptance of these

great principles of neutral rights. (Sir Travers Twiss, Law of War, sec. 209.)

Mr. Hall, in his recent work on *The Rights and Duties of Neutrals*, (p. 19,) says:

"An act of the State which is prejudicial to the belligerent is necessarily done with the intent to injure; but the commercial act of the individual only affects the belligerent accidentally. It is not directed against him; it is done in his way of business, with the object of getting a business profit, and, however injurious in its consequences, it is not instigated by that wish to do harm to a particular person which is the essence of hostility. *It is prevented because it is inconvenient, not because it is a wrong;* and to allow the performance by a subject of an act not in itself improper, cannot constitute a crime on the part of the State to which he belongs. Trade between a neutral individual and a belligerent, which is prejudicial to the operations of a country at war, not being in itself wrong, even in the qualified sense in which non-neutral acts can be said to be wrong, the belligerent right to interfere with it is, theoretically, a derogation from the strict rights of the neutral State, which refrains, in so far as its subjects are affected by the belligerent, from protecting them in the performance of innocent acts. The justification of this usage lies in its convenience."

Mr. Pomeroy, in an essay on *The Law of Maritime Warfare as it Affects the Belligerents*, (North American Review, April, 1872, p. 377,) which is cited by Dr. Phillimore in the last edition of his work, (3 Int. Law, 273,) remarks upon the misconception existing in the popular mind, "even in our American popular diplomatic writings, emanating from men who have been trained by no previous study or experience for diplomacy," in regard to this subject of neutral trade in time of war. The learned author lays down these propositions as now settled in the public law:

"*Firstly.* A neutral nation in its organic capacity, and as represented by its Government, may not aid either of the belligerents.

"*Secondly.* Neutral subjects may freely, and without any risk, carry their own goods in their vessels to all the ports of a belligerent which are open,—that is, not blockaded by

the other party,—provided that the goods are not contraband; subject to the liability of the vessels being searched on the high seas by the cruisers of the other party, to ascertain if there are contraband goods on board, and subject also to the risk and penalty incident to contraband commerce.

"It is generally said that commerce in contraband is illegal. This is, as it seems to me, a very inaccurate way of stating the doctrine; and the use of the word 'illegal' has done much to create the confusion of ideas which so generally exists in reference to this subject. It is more accurate to say, that if a neutral transports to a belligerent articles contraband of war, he does so under the risk and penalty of having the ship seized, the voyage broken up, and the prohibited goods condemned by decree of a prize court. Perhaps the whole cargo might, under some circumstances, be confiscated; but it is not now the practice to condemn the vessel if her destination be to an open port. If the neutral adventurer evades the hostile cruisers, and gets his contraband to its intended purchaser, all risk and liability are ended. He is in no way responsible for that act, even though he should be overhauled on the return or another voyage; and this simple fact shows conclusively that his proceeding is not, in any true sense of the term, *illegal*.

"When an effective blockade of a port has been established, it is commonly said that all neutral trade with the place is illegal. The same criticism is to be made here as in the last case. It is more accurate to say that a neutral voyage to a blockaded port is under this very serious risk—the vessel and cargo may be captured by the cruisers of the blockading party, and will be entirely confiscated by decree of a prize court, ship and lading, without reference to the nature of the goods. This risk lasts from the beginning of the outward voyage to the end of the return voyage, because coming out of the blockaded port is as much prohibited as going into it. But if the return voyage be completed in safety, all liability for the adventure is ended, even though the ship should afterwards be taken."

Mr. De Burgh, an English author, in his excellent work, entitled *The Elements of Maritime International Law*, points out with great clearness that any doctrine which would regard neutral trade with a belligerent as unlawful, would practically convert peaceful nations into the allies and adherents of belligerent States.

Mr. De Burgh, after referring to the judgment of Lord Westbury in *Ex Parte Chavasse*, and Dr. Lushington in the case of *The Helen*, (hereafter cited,) expressly founded upon the celebrated decisions of this Court, which adjudge that there is nothing in the municipal law or the law of nations which renders any trade with a belligerent illegal, says:

"Eminent writers in the United States have confirmed the doctrine, in support of which may also be cited a remarkable passage in Vattel, (Liv. III, c. 8,) and which, indeed, may be said to have on its side all the weight, both of reason and authority. For were the acts of the sovereign so identified with those of the subject as that the avowed neutrality of the former should have effect in curtailing the freedom of commerce which the latter enjoys, in the large majority of cases the inequality of the incidence of the prohibition on the position of the belligerents respectively would, in fact, amount to lending one of the parties indirect aid in enforcing the rights of war as against his adversary. Let, for instance, the contract be to supply a blockaded port with provisions or munitions of war. If the law of nations, which it is admitted visited such a contract with certain penalties, was, as has been sometimes argued it should be, incorporated with and made part of the municipal law of the country of the contractor, his Government would be identified with his acts, and obliged to assume the responsibility for them to the belligerent power whose interests would sustain injury by the contract. And thus the result of the acts of his subjects being imputed to the neutral sovereign would be, in the case supposed, a departure from his neutral position; for, by curtailing the freedom of commerce, assistance would indirectly perhaps, but not the less really, be given to the blockading power, who, in consequence of the aid withheld from the blockaded port, would be in a position to effect its reduction with a smaller force and in a shorter space of time.

"This was the view taken of the question in the two cases in which it was discussed and decided in this country, in both of which the learned judges were not the less explicit in asserting the rights of neutral traders to carry on without restriction their commercial transactions with every other nation.

"In the view of International Law which these cases and

authorities serve to establish, the commerce of nations is regarded as perfectly free and unfettered; and the right which the subjects of each country enjoy to interchange the products of labor with the inhabitants of other countries is subject to no other restriction than that which is imposed by those conflicting rights which, during a state of war, the usage of nations—in other words, International Law—confers upon the belligerent power."

4. The subjects of neutral States having the right to trade with a belligerent in the same manner and to the same extent as before the war, or as they would independently of war, and no criminality or illegality being imputable to them in respect of such trade, what rights pertinent to this discussion may be exercised by belligerents, according to international usage, in respect to such trade, and what view is taken of those rights by the modern public law?

First. The belligerent has the right by the existing custom to intercept, capture, and confiscate such commodities of neutral ownership as are capable of being immediately used in the prosecution of hostilities, when found on the high seas in transit to his enemy's territory.

Secondly. He may bar access to and egress from the ports of his enemy, on the part of neutrals, for purposes of trade, by so placing a naval force as to make approach or egress dangerous, and to capture and confiscate property of neutral ownership found on the high seas in the act of going to or coming from such ports.

The privilege accorded to the belligerent is simply to prevent the proposed trade by the capture and confiscation of the property, if it can be taken *in delicto;* and with the *liability of the neutral to the capture and loss of the cargo if he transports contraband of war, and to the capture and loss of ship and cargo if he breaks a blockade, ends the restraint which the belligerent may lawfully impose on the commerce of the neutral.*

The neutral commits no *offense* against the belligerent; nor does the confiscation proceed, under the public law,

upon the ground of an offense, but wholly upon the special *predicament* of the particular property at the time of capture. The terms "offense" and "illegal" are wholly misapplied when used in relation to this species of trade. It is not an offense, nor is it illegal, under any law whatsoever. The neutral's right to carry on the trade, subject to the risk, is as high and firm as the belligerent's right to impose the forfeiture. The doctrine of the law of nations is stated by Sir Travers Twiss to be, that the transport of merchandise to the ports of a belligerent State is *per se* a perfectly *lawful act* on the part of the neutral merchant. "The right of the neutral to transport," he says, "and of the adverse belligerent to seize, are conflicting *rights*, and *neither party can charge the other with a criminal act.*" (Law of War, preface, XVII.)

We shall see that this is the settled doctrine of the public law of the United States; and it has been, in terms, judicially affirmed by the highest authorities in England. "The title of the belligerent," said Lord Westbury in *Ex Parte Chavasse*, (*supra*,) "is limited entirely to the right of seizing and condemning as lawful prize. He has no right to inflict any punishment on the neutral trader or to make his act a ground of complaint against the neutral State of which he is a subject. In fact, the act of the neutral trader, in transporting munitions of war to the belligerent, is quite *lawful;* and the acts of the other belligerent, in seizing and appropriating the contraband articles, is equally lawful. *Their conflicting rights are coexisting, and the right of the one party does not render the act of the other party wrongful or illegal.* That the act of the neutral merchant is in itself *innocent* is plain from the circumstance that the belligerent cannot visit it with any penal consequence *beyond the judicial condemnation of the ship and cargo, nor can he make it the subject of complaint.*"

5. These belligerent privileges are admitted encroachments on the national rights of commerce which neutral nations are entitled to enjoy; and the great effort of modern

reform in the law of nations in the time of war has been to reduce them within the narrowest limits. Sir Travers Twiss has shown that they had their origin in the arbitrary practice of powerful belligerents, in times when *might* made *right*, of prohibiting by proclamation all neutral trade with the ports of the enemy—a practice which was successfully impugned in the seventeenth century, and has never since had any sanction in the public law of Europe. (Law of War, secs. 98, 101, 122.)

The general existing usages in regard to contraband and blockade are the results of international endeavors to harmonize the conflicting interests of belligerents and neutrals; but they still contain evidences of their barbarous origin.

The Government of the United States has been foremost in its efforts to obtain such conventional modifications of existing usages as would give the greatest freedom to the exercise of the rights of neutral commerce. When the adhesion of the United States to the Declaration of Paris of 1856 was proposed and declined, unless an article should be adopted protecting from capture all private enemy property at sea, not contraband, Mr. Marcy, in his letter to Count de Sartiges of July 14, 1856, declared that due regard to neutral rights required, in fact, an *abandonment* of the doctrine in regard to *contraband trade*, as well as to the right of *visit and search*, and the complete liberty of neutral commerce, excepting with blockaded ports.

"Though the United States," he said, "do not propose to embarrass the other pending negotiations relative to the rights of neutrals by pressing this change in the law of contraband, they will readily give it their sanction whenever there is a prospect of its favorable reception by other maritime powers." (President's Message and Documents, 1856, p. 35.)

The next administration of the Government, under President Buchanan, went further, and proposed to restrict the right of *blockade* to places actually besieged, thus abolishing all merely *commercial blockades;* a proposal which was advocated with great ability by Secretary Cass in his in-

structions to the American Ministers abroad during the Italian war. (President's Message 1859–1860, p. 31.)

The doctrines of the American Government on this subject at that time, as announced by Mr. Cass, met the approval of Mr. Cobden, and are commended by the eminent publicist, Mr. Westlake, in an interesting tract on "*Commercial Blockades considered with reference to Law and Policy.*"

The restrictions upon existing belligerent privileges thus sought to be imposed by the United States were founded upon the principle expressed by Mr. Marcy, that "nations which preserve the relations of peace should not be injuriously affected in their commercial intercourse by those who choose to involve themselves in war," and expressed by Mr. Cass, that "war against the trade of peaceful and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinion of modern times."

V.

Commerce by Neutrals within the Territory of a Belligerent.

Before directing attention to the public law in regard to the special subject of the *trade of neutrals with contraband goods to a belligerent*, it is proper to consider the doctrines of the public law in reference to trade by neutrals, *within the territory of the belligerent, and in his blockaded ports*, and the application of those doctrines in the case of a civil war, in which both parties are in the regular exercise, with the sanction of foreign nations, of the rights of belligerency.

1. No publicist will deny that the principle that neutrals have the right to trade with their belligerent friend *within the territory of the belligerent*, includes the sale of all property safely transported to a blockaded port, as well as the purchase of property found in the markets of the belligerent State, whether from the Government or the inhabitants of

that State. The public law of contraband and blockade confers, as we have seen, a privilege upon a belligerent to affect the neutral merchant simply with the forfeiture of the particular property, *if captured upon the high seas before its arrival at the enemy's port of destination.* After its arrival the property, whether contraband or otherwise, is the *lawful subject of sale and purchase* in the belligerent's territory,—as much so as if no war existed and universal peace prevailed. The title and ownership of the property are effectually changed by any sale of it in the belligerent territory; no illegality can be imputed to the transaction; and the conduct of the neutral cannot afterwards be impeached by the other belligerent, or by neutral States.

These cardinal principles of neutral rights were, in fact, adjudged by this Court in the celebrated case of *The Santissima Trinidad and The St. Andre*, (7 Wheaton, 283,) where the judgment, as stated by Sir Travers Twiss, proceeded on the assumption that contraband of war, having been safely landed, is the lawful subject of sale, like any other property in the belligerent territory, and the purchaser acquires a valid title to the property under the law of nations. (Law of War, sec. 227.)

The very question in that case, was as to the right of the original owners of *The Independencia*, although equipped as a vessel of war, to send her out from Baltimore, and effect a valid sale of her, as contraband of war, at the port of Buenos Ayres. The Court held that the sale to the *de facto* Government of Buenos Ayres was valid, under the law of nations, and passed the title of the American owners to the belligerent purchaser. The judgment of Mr. Justice Story, and the doctrine inculcated by it, are thus referred to by Sir Travers Twiss:

"It is apparent, said Mr. Justice Story, that, although equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as a good prize for being

engaged in a traffic punishable by the law of nations. But there is nothing in our laws or in the law of nations which forbids our citizens from sending armed vessels, as well as munitions of war, *to foreign ports for sale*. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of the contraband. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bona-fide* sale, there is no pretence to say that the original outfit on the voyage was illegal, or that a capture made by the vessel after the sale was, for that cause alone, illegal.

"The above judgment proceeds upon the assumption that by the law of nations an armed ship, although it be the private property of a neutral merchant, may be captured by a belligerent cruiser on the high seas as contraband of war, if it be destined to an enemy's port for sale; but that if it has arrived in an enemy's port, a neutral merchant may lawfully sell it, just as he may lawfully sell a cargo of arms and munitions of war which he has safely transported over the high seas to an enemy's market."

(Law of Nations, War, p. 463.)

The principle is the same in the case of property sold in a blockaded port: in both the cases of contraband and blockade the liability of the neutral is *deposited with the cargo*, and the property becomes the lawful subject of sale in the belligerent markets.

2. The doctrine as to the right of neutrals to trade with their belligerent friend equally includes, as has been said, the purchase of property by neutrals in the markets of the belligerent; and the other belligerent cannot impeach such transactions upon the ground that the ports or places where they occurred were at the time under a maritime blockade. The existence of a blockade can have no effect upon the validity of any *bona-fide* commercial transactions between neutrals and the belligerent within the territory of the latter. The belligerent right extending no further than the privilege of confiscating neutral property taken *in transitu*, it would be absurd to claim that dealings with property by neutrals within the territory and jurisdiction

of the belligerent State are affected by the fact of the existence of a blockade. It has never been supposed by any publicist that a blockade interfered to the least extent with the right of neutrals to acquire property in the territory of their belligerent friend, or affected the validity of any commercial dealings between neutrals and the belligerent in the territory of the latter. Commerce between neutrals and the belligerent in the territory of the latter is free from all belligerent restriction, and contracts there made have the same effect in conferring the ordinary rights of property they would have, if there were no war, or if there were no blockade. The blockading power has no more jurisdiction over the territory of the belligerent than it has over the territory of a neutral State; and *infra-territorial* transactions between neutrals and the belligerent, in the latter's territory, are as valid as like transactions in the neutral's territory.

3. No publicist, therefore, can well dispute the proposition, that a British subject, domiciled in his own country, was as free to trade, make contracts, and acquire property in the territory of the Confederate States during the hostilities, as if those States were a recognized Government engaged in a foreign war with the United States; that such trading and transactions were unaffected by any municipal law or policy of the United States; and that they were wholly legal and valid under the law of nations.

While, in the courts of the United States, it may be supposed that the right of persons domiciled in the Confederate States, who owed allegiance to the United States, to enter into contracts in that territory, should be restricted to such transactions as were not in aid of the rebellion, no such restriction could be imposed by those courts, or any courts, upon the rights of neutrals domiciled abroad, who, of course, owed no allegiance to the United States, to carry on their trade and commerce with and in the Confederate States.

The validity of commercial transactions, on the part of neutrals who never owed allegiance to the United States, is to be determined by the application of the principles and rules of the law of nations. Such transactions, as to the United States, were neither criminal nor wrong, absolutely or *sub modo*. They were, on the contrary, as between the United States and such foreign subjects, perfectly lawful as matter of law, and perfectly moral as matter of ethics. Contracts entered into by such persons in the Confederate States, whether relating to cotton or any other merchandise, were made in the legal exercise of their *rights* under the law of nations. They had, by that law, the absolute right of commerce in the territory of the Confederate States, so long as that power remained the master of the territory; and the United States could not, by legislation or otherwise, affect that right without a breach of the public law, and of their international duty to the neutral States, whose protection such foreign subjects might be entitled to invoke.

VI.

Trade by Neutrals with a Belligerent in Articles Contraband of War.

Having thus considered the doctrines of public law applicable to trade by neutrals within the territory of a belligerent, in a public and a civil war, we have now to present the doctrines of international law in regard to trade by neutrals with a belligerent within the *territory of the neutrals*, and maritime trade carried on by neutrals *between the neutral country and the belligerent territory*. In this connection we have to consider the doctrines and usages of nations in regard to the *sale* and *transportation* of articles *contraband of war*, and the transportation of property by neutrals to *blockaded* belligerent ports.

No American publicist, statesman, or jurist, of recognized authority, has ever denied the *right* of neutral subjects, under the public law, to *sell and deliver to a belligerent purchaser articles contraband of war within the neutral territory, or to*

export and transport such articles from the neutral territory to the belligerent territory for sale to, or for the use of, the belligerent; or that this right is equally exercisable as well where the belligerent's ports and coasts are under a maritime blockade, as where no such blockade has been imposed by the other belligerent.

No principal or rule of international law, or of municipal law, is infringed by a neutral who engages in such transactions, or by a neutral Government that permits them; and by the settled principles of the public law, a neutral State has generally no international *right* to *interfere* with such trade in any manner, and is bound to permit it to be carried on within and from its territory, at the peril of violating its international duty of *impartial* neutrality.

The principles on this subject first expounded with completeness by Vattel (L. III, c. 7, § 110) and the great publicists of the eighteenth century, were developed and enforced by this Government, in its attitude of neutrality during the European wars of the early part of this century.

They constitute a part of the great doctrines of *Neutral Rights* maintained by the United States, and expounded by *this* Court, at that period; so that Sir Travers Twiss has said, that "*it has been reserved for the Judges of the Supreme Court of the United States of America, during the early part of the* 19*th century, to give the fullest and clearest exposition of the Rights of Neutral Nations.*" (Law of War, sec. 209.)

The doctrine, always asserted and acted upon in this country, is so well stated in a masterly discussion of the whole subject of *Contraband of War* in the *American Law Review* for January, 1871, (especially in reference to the abortive attempt of Prussia, in her late war with France, to introduce the notion of "benevolent neutrality,") that we present a few passages from that article:

"For the neutral merchant, the principle of contraband is simply the introduction of a new element into his commercial calculations. It is the addition of an exceptional risk, which is to be met by an exceptional profit. A ship-

ment of arms to a belligerent is exposed, beside the ordinary perils of the sea, to the especial peril of capture and confiscation. Higher prices must consequently be demanded than would rule if the nation of the consignee were at peace with its neighbors. This being the precise aspect of the matter, commercially, it follows that the principle o contraband imposes no *restriction* upon neutral trade, but is simply an *incumbrance* upon it. The general right of the neutral to trade to and with the belligerent remains as full and perfect after as it was before the inception of war. No law puts a positive prohibition upon any branch of commerce; but international law fastens upon commerce, in certain specific articles called contraband, the incumbrance, risk, or penalty of confiscation if they be captured by either belligerent in transit to the other. It is true that publicists speak of trade in these articles as 'illegal,' but the phrase is loosely convenient, rather than precisely accurate. If the trade is 'illegal,' it must be contrary to some recognized code of law. Yet it is easy to see that it is not in contravention of any description of law whatsoever.

"It is not in contravention of international law; for if international law *forbade* the exportation and sale of arms to a belligerent, then such exportation and sale, being a positive breach of a positive injunction of a supreme code, would be a *casus belli*, would assume the shape of national offense, would enable the belligerent Government to call the neutral Government to account, would justify the belligerent Government in requiring active exertions for suppression on the part of the neutral Government. The offense would be as great, or in effect greater, if the cargo arrived at its destination than if it were stopped on the way. Yet none of these conditions are true. The exportation of material of war is not a *casus belli*, nor, so far as the neutral is concerned, does it wear the aspect of a national matter. International law, therefore, does not forbid it, but simply says of it that it is a description of trade so *injurious* to the belligerent that he may be entitled, without offense to the neutral, to break it up if he can. He is allowed to break it up by the simplest, if not indeed the only practical method, by seizing and keeping such merchandise whenever he can lay hold of it upon the high seas on its way to the foe.

"International law, then, leaves the *right* to trade free and unobstructed. It is because international law so leaves it that the neutral Government is not bound to interfere

with it. That it is not so bound, is as certain as is anything concerning the obligations of civilized nations towards each other."

(*a*) Every utterance of American statesmen sanctions this statement of the public law.

Mr. Jefferson wrote to Mr. Hammond, the British Minister, May 15, 1793, as follows: *

"The purchase of arms and military accoutrements by an agent of the French Government in this country, with an intent to export them to France, is a subject of another of the memorials.. Of this fact we are equally uninformed as of the former. Our citizens have been always free to *make*, *vend*, and *export* arms. It is the constant occupation and livelihood of some of them. To suppress their callings—the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries, in which we have no concern—would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement in their occupations. It is satisfied with the external penalty pronounced in the President's Proclamation: that of confiscation of such portion of these arms as shall fall into the hands of any of the belligerent powers on their way to the ports of their enemies."

1 American State Papers, F. R., 100.

Alexander Hamilton embodied this doctrine in his instructions of August 4, 1793, to collectors of customs. (Ib., 141.)

"The purchasing within and exporting from the United States, by way of merchandise, articles commonly called contraband, being, generally, warlike instruments and military stores, is free to all the parties at war, and is not

*It has been observed that the complaints of Mr. Hammond, in 1793, were nearly a repetition of those which Lord Stormont, during the war of our independence, had addressed to M. de Vergennes, the Minister of Foreign Affairs of France, relative to the export of arms to America. The reply of M. de Vergennes was that the only penalty was the capture of the contraband by Great Britain. (De Martens, Causes Celebres du Droit des Gens., 111, 247.)

interfered with. If our citizens undertake to carry them to any of those parties, they will be abandoned to those penalties which the laws of war authorize."

Attorney-General Charles Lee, in his opinion to the Secretary of State, of January 20, 1796, expounded the subject with great clearness, especially in showing that a belligerent had no right to affect neutrals engaged in contraband trade with any penalty whatever, except that provided by the law of nations. He said:

"That an enemy may come into the territory of a neutral nation, and there purchase and thence remove any article whatsoever, even instruments of war, is a law of nations, long and universally established. To deny a right to any of the belligerent powers to carry on this trade, without denying it to both, would be a departure from that line of perfect neutrality which the United States have invariably observed. It is true, this right may be denied to all nations, by a law to be passed for that purpose at this time; but if the reason for passing such a law is to impede the military operations of either belligerent power, and to favor the other, it is manifest that such conduct would be a breach of neutrality; consequently, while the French and the British are equally permitted to purchase horses, and export them from any of the States, as they heretofore have been and now are permitted, neither has any just cause of complaint. Indeed, I may add here, that if the individual citizens of the United States carry on a contraband commerce with either of the belligerent powers, neither can charge it upon the Government of a neutral nation as a departure from neutrality. Forfeiture of goods and ship is the penalty annexed to such acts by the law of nations, and if this were not so, it would be in the power of individuals to involve the neutral nation in a war against its will.

"It is not considered as a *duty* imposed upon a nation by a state of neutrality to prevent its seamen from employing themselves in contraband trade.

"If a citizen of a neutral State, for hire, serves as a mariner on board of a neutral ship employed in contraband commerce with either of the belligerent powers, *he is not liable to any prosecution or punishment for so doing by the municipal laws of his own State, nor is he punishable personally, according to the law of nations, though taken in the*

fact by that belligerent nation to whose detriment the prohibited trade would operate. In such a case the contraband merchandise, and the vessel, too, (unless excepted by treaty,) may be seized and confiscated; and thus the owner of the property is punished by the loss of it, but the mariner rendering personal service suffers no penalty or loss whatever, unless, perhaps, a loss of his wages shall ensue from a disappointment in the freight."

Attorney-General Legare, the most accomplished jurist, among the dead, who ever held that office, in an opinion to the Secretary of the Treasury of December 29, 1841, said:

"The policy of this country is, and has ever been, perfect neutrality and non-interference in the quarrels of others; but, by the law of nations, that neutrality may, in the matter of furnishing military supplies, be preserved by the two opposite systems, viz.: either by furnishing both parties with perfect impartiality, or by furnishing neither. If you sell a ship of war to one belligerent, the other has no right to complain so long as you offer him the same facility. The law of nations allows him, it is true, to confiscate the vessel as contraband of war if he take her on the high seas; but he has no ground of quarrel with you for furnishing or attempting to furnish it. But with a full knowledge of this undoubted right of neutrals, this country has seen fit, with regard to *ships of war*, to adopt the other branch of the alternative—less profitable with a view to commerce, but more favorable to the preservation of a state of really pacific feeling within her borders—she has forbidden all furnishing of them under severe penalties." (Mr. Legare to Mr. Forward, December 29, 1841.)

Mr. Webster, in 1842, instructed Mr. Thompson, our Minister to Mexico, as follows:

"It is not the practice of nations to undertake to prohibit their own subjects from trafficking in articles contraband of war. Such trade is carried on at the risk of those engaged in it, under the liabilities and penalties prescribed by the law of nations or particular treaties. There can be no doubt at all, for the last six years the trade in articles contraband of war between the United States and Mexico has been greater than between the United States and Texas. Why has not Texas a right to complain of this? For no

reason, certainly, but because the permission to trade, or the actual trading, by the citizens of a Government, in articles contraband of war, is not a breach of neutrality."

6 Webster's Works, p. 452.

Mr. Webster, during the same civil war between Mexico and Texas, instructed Mr. Thompson:

"*As to advances, loans, or donations of money or goods made by individuals to the Government of Texas, or its citizens, the Mexican Government hardly needs to be informed that there is nothing unlawful in this so long as Texas is at peace with the United States*, and that these are things which no Government undertakes to restrain."

Ex. Doc. 27th Cong., 1841–'42, vol. 5, Doc. 266.

President Pierce stated the principle with clearness and force in his Message of December, 1854, during the Crimean war:

"The laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war, *to take munitions of war or soldiers on board their private ships for transportation;* and, although in so doing the individual citizen exposes his property to some of the hazards of war, his acts do not involve any breach of national neutrality, nor of themselves implicate the Government. Thus, during the progress of the present war in Europe, our citizens have, without national responsibility therefor, sold gunpowder and arms to all buyers, regardless of the destination of those articles. Our merchantmen have been, and still continue to be, largely employed by Great Britain and France *in transporting troops, provisions, and munitions of war to the principal seat of military operations, and in bringing home the sick and wounded soldiers; but such use of our mercantile marine is not interdicted, either by the international or by our municipal law, and, therefore, does not compromise our neutral relations with Russia.*"

It was during the administration of President Pierce that Mr. Marcy, the Secretary of State, proposed to Count de Sartiges, in his note of July 14, 1856, to agree to the aboli-

tion of the right of belligerents to capture contraband of war. Mr. Marcy said:

"As connected with the subject herein discussed, it is not inappropriate to remark that a due regard to the fair claims of neutrals would seem to require some modification, if not abandonment, of the doctrine in relation to contraband trade. Nations which preserve the relations of peace should not be injuriously affected in their commercial intercourse by those which choose to involve themselves in war, provided the citizens of such peaceful nations do not compromise their character as neutrals by a direct interference with the military operations of the belligerents.

"The laws of siege and blockade, it is believed, afford all the remedies against neutrals that the parties to the war can justly claim. Those laws interdict all trade with the besieged or blockaded places. A further interference with the ordinary pursuits of neutrals, in nowise to blame for an existing state of hostilities, is contrary to the obvious dictates of justice. If this view of the subject could be adopted, and practically observed by all civilized nations, the right of search, which has been the source of so much annoyance and of so many injuries to neutral commerce, would be restricted to such cases only as justified a suspicion of an attempt to trade with places actually in a state of siege or blockade."

Mr. Seward discussed the subject with Mr. Romero, the Mexican Minister, during the war of the French intervention in Mexico, and adhered to what he termed the "*settled and traditional policy of the country.*"

Mr. Seward, in his dispatch of December 15, 1862, says:

"Mr. Romero builds his argument upon the fact that clearances of arms, said to be designed for the use of the Mexican Government, were denied in its war with France, while clearances of wagons, designed for the use of the French Government, in the same war, are allowed.

"Mr. Romero is respectfully informed that prohibition of the shipment of arms, in the case referred to, was a general prohibition, including all other nations, as well as Mexico, on the ground of the military necessities of the United States, which, while engaged in suppressing a formidable insurrection, cannot consent that fire-arms of any kind shall be sent out of the country as merchandise.

"For these reasons—first, because the Government may need all such arms; and, second, that they might fall into the hands of the insurgents—neither the French, who are at war with Mexico, nor any other nation which is at peace with the United States, no matter what its condition or its situation, could now be allowed to export arms of any sort from this country. Mr. Romero implies, probably with truth, that wagons are as necessary and will be as useful to the French as fire-arms would be to the Mexicans. But the pertinency of the argument is not apparent, insomuch as the shipment of arms is denied to Mexico on the ground, not of want of them on her part as a belligerent, but on the ground of the military situation of the United States; and, on the other hand, the wagons are allowed to be shipped, not on the ground that France wants them as a belligerent, but on the ground that the military situation of the United States does not demand an inhibition.

"The Republic of Mexico enjoys the sincere friendship and good-will of the United States, and they lament the war which has arisen between that country and France. They are, however, not a party to the war; and, since it has unhappily occurred, they can act in regard to it only on the principles which have always governed their conduct in similar cases. The trade of the United States, according to these principles, is left free to both nations, just as if they were at peace with each other, and no restrictions are imposed upon it to the favor or prejudice of either nation."

It is well known that during the late war between France and Prussia, the Government of the United States itself made a series of public sales of surplus guns, rifles, and other arms at New York; and that large quantities were bought by French agents, taken on board French ships direct from the arsenal at Governor's Island, and paid for through the French Consul. (Sir E. Thornton to Lord Granville, Parl. Papers, Franco-German War, 1871, p. 204.)

The report of the Secretary of War stated that the sales of ordnance stores by the Government of the United States in the years 1870-'71 amounted in the aggregate to $10,000,000.

The steamers of the French line from New York to Havre, which were also engaged in carrying the mails, under con-

tract with the French Government, transported large shipments of arms and munitions of war to France, while other vessels were chartered by French agents, and freighted in the United States with arms manufactured by Messrs. Remington & Sons for the French Government.

In 1870, nearly one thousand two hundred Frenchmen embarked at New York in the *Lafayette* and the *Ville de Paris* for the purpose of joining the French armies. The vessels carried ninety-six thousand rifles and eleven million cartridges. Mr. Fish was of opinion that the ships could not be looked upon as intended to be used for hostile purposes against Germany, and that the arms and ammunition were, in themselves, subjects of legitimate commerce. (Sir E. Thornton to Lord Granville, Sept. 26, 1870; Ibid., 183.)*

(*b*) The decisions of American judges:

Chancellor Kent, in *Seton* v. *Low*, (1 Johnson's Cases, 1,) laid down, in 1799, the doctrine, which he afterwards reaffirmed, (when writing for the instruction of American lawyers,) in his *Commentaries*, vol. 1, p. 142. He said, in *Seton* v. *Low:*

"A neutral has nothing to do with the war, and is under

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*During the present war between Russia and Turkey, arms and ammunition, as well as money, are being constantly supplied by this country to Turkey. The following are taken from the journals of the day:

ARMS AND AMMUNITION FOR TURKEY.

BOSTON, MASS., Aug. 14.—The English steamer *John Bramall* sailed from New Haven Saturday night with a valuable cargo of ammunition consigned to the Turkish War Department. The Bridgeport Metallic Cartridge Works shipped thirty-two car-loads of cartridges, and the Whitney Arms Company of New Haven supplied the rest of the cargo. No report of her sailing was made, for the obvious reason of keeping the Russian authorities in ignorance as to her movements.

ARMS FOR THE TURKS.

NEW HAVEN, CONN., Jan. 12.—This afternoon the iron steamer *Remus* reached this port, having come for a load of arms and munitions for the Turkish Government. She will not begin to take on cargo for several days. Meanwhile the iron steamer *John Bramall* still lies in the Sound, just outside of the harbor, ready to start, bearing a cargo worth over $1,500,000. She has been long delayed, and for fourteen days has drawn demurrage at the rate of $250 a day.

no moral obligation to abandon or abridge its trade; and yet, at the same time, from the law of necessity, as Vattel observes, the powers at war have a right to seize and confiscate the contraband goods, and this they may do on a principle of self-defense. *The right of the hostile power to seize does not destroy the right of the neutral to transport.* The trade by a neutral, in articles contraband of war, is therefore a *lawful trade*, though a trade, from necessity, subject to inconvenience and loss."

Chancellor Kent, in the *Commentaries*, (vol. 1, p. 142,) says:

"It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign himself. It was contended on the part of the French nation, in 1796, that neutral Governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell at home, to a belligerent purchaser, or carry themselves to the belligerent powers, contraband articles, subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country. The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act."

Chief Justice Parsons, in 1809, in *Richardson* v. *Maine Ins. Co.*, (6 Mass., 113,) declared the American doctrine a public law, with his great power and authority.

These principles were stamped, in 1822, with the approval of Judge Story, and the Supreme Court of the United States in the famous case of *The Santissima Trinidad:* (7 Wheaton, 340:)

"There is nothing in our laws, or in the law of nations, that forbids our citizens from sending *armed vessels*, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation."

(*c*) The doctrine upheld by American publicists on this subject was defended with great learning and ability by Dr. Noah Webster, in an elaborate paper on *The Rights of Neutral Nations*, in which he showed that the law relating to contraband did not arise out of the obligations of neutrality, but was wholly conventional. (N. Webster's Writings, 42.)

In this opinion, Dr. Webster followed the conclusion of such authorities as Kluber and Jouffroy and Lebeau, who contend that the whole law of contraband rests upon *conventions*, and that there is no common law of nations in such matters. (Kluber, Droit de Gens., § 288; Jouffroy, Droit Maritime, p. 3; Lebeau, Code des Prises, Tom 1, p. 15.)

(*d*) These doctrines of our own country have passed into the international jurisprudence of Great Britain by decisions of two judges of the highest eminence—Lord Westbury and Dr. Lushington.

Ex-parte Chavasse v. Grazebrooke, 11 Jurist, N. S. Pt. I., p. 400.

The Helen, Ib., p. 1025; S. C. L. R., 1 A. & E., 5.

Lord Westbury, in *Ex-parte Chavasse*, (*supra*,) denied the right of a belligerent to "inflict ANY *punishment* on the neutral trader for transporting munitions of war to a belligerent country, or to make his act a ground of complaint against the neutral State."

The question in that case was as to the legality of a contract between British subjects for the exportation of contraband of war to the insurgent States of America.

Lord Westbury said:

"In the view of international law the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labor with the inhabitants of every other country. If hostilities occur between two nations, and they become belligerents, neither belligerent has a right to impose, or require a neutral Government to impose, any restrictions on the commerce of its subjects. The belligerent power certainly acquires certain rights which are given to it by international law. One of these is the right to arrest and capture, when found

on the sea, (the high road of nations,) any munitions of war which are destined and in the act of being transported in a neutral ship to its enemy. This right, which the laws of war gives to a belligerent for his protection, does not involve, as a consequence, that the act of the neutral subject, in so transporting munitions of war to a belligerent country, is either a personal offense against the belligerent captor, or an act which gives him any ground of complaint, either against the neutral trader personally, or against the Government of which he is a subject. The title of the belligerent is limited entirely to the right of seizing and condemning as lawful prize the contraband articles. *He has no right to inflict any punishment on the neutral trader, or to make his act a ground of complaint against the neutral State of which he is subject.* In fact, the act of the neutral trader, in transporting munitions of war to the belligerent country, is quite lawful; and the act of the other belligerent, in seizing and appropriating the contraband articles, is equally lawful. Their conflicting rights are coexisting; and the right of the one party does not render the act of the other party wrongful or illegal.

"There is, however, much incorrectness of expression in some writers on the subject, who, in consequence of the right of the belligerent to seize *in transitu* munitions of war while being conveyed by a neutral to his enemy, speak of the act of transport by the neutral as unlawful and prohibited commerce. But this commerce, which was perfectly lawful for the neutral with either belligerent country before the war, is not made by the war unlawful, or capable of being prohibited by both or either of the belligerents; and all that international law does is to subject the neutral merchant who transports the contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined. That the act of the neutral merchant is in itself innocent, is plain from the circumstance that the bellgerent captor cannot visit it with any penal consequence beyond the judicial condemnation of the ship and cargo, nor can he make it the subject of complaint.

"This is well explained by Vattel in the following passage. Speaking as a belligerent power, he says:

"'When I have notified to them my declaration of war against such or such a nation, if they will afterward expose themselves to risk in supplying her with things which serve to carry on war, they will have no reason to complain if

their goods fall into my possession; and I, on the other hand, do not declare war against them for having attempted to convey such goods. They suffer, indeed, by war in which they have no concern; but they suffer accidentally. I do not oppose their right, I only exert my own; and if our rights clash with and reciprocally injure each other, that circumstance is the effect of inevitable necessity. Such collisions daily happen in war.'

"Vattel must here be considered as speaking of the acts of the subjects of a neutral power, and not of the neutral Government itself, for the supplying of warlike stores to a belligerent by a neutral State would clearly be a breach of neutrality.

"The same doctrine as to the freedom of the commerce of the neutral subject is more explicitly stated by Mr. Chancellor Kent, in the first volume of his Commentaries, (p. 145, 8th ed.,) and was most distinctly affirmed in a celebrated decision of the Supreme Court of the United States—*The Santissima Trinidad.*

"The language of Chancellor Kent is clear and comprehensive: 'It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate all contraband goods without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality on the neutral sovereign himself. It was contended on the part of the French nation, in 1796, that neutral Governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers; but it was successfully shown, on the part of the United States, that neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves, to the belligerent powers, contraband articles, subject to the right of seizure *in transitu.* This right has since been explicitly declared by the judicial authorities of this country. The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act.' (1 Kent's Comm., 145.)

"The material passage of the judgment to which I have referred, as given in the 7th volume of Wheaton's Reports, is the following:

"'There is nothing in our laws, or in the law of nations, that prohibits our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure, which no nation is bound to pro-

hibit, and which only exposes the persons engaged in it to the penalty of confiscation.' (7 Wheat., 340.)

"I take this passage to be a very correct representation of the present state of the law of England also; for if a British ship-builder builds a vessel of war in an English port and arms and equips her for war *bona fide* on his own account, as an article of merchandise, and not under or by virtue of any agreement, understanding, or concert with a belligerent power, he may lawfully, if acting *bona fide*, send the ship so armed and equipped for sale as merchandise in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment act. It is true, that under the provisions of the act of the 16 and 17 Vict., c. 107, Her Majesty has power, by proclamation or order in council, to prohibit the exportation of certain goods, including arms, ammunition, gunpowder, naval and military stores; but no order in council or proclamation was made in the terms or under the special authority of this statute. Great reliance, however, was placed by the counsel for the respondents on the Queen's Proclamation of the 13th May, 1861. Although it was admitted that it could not be treated as made under the authority of the last-mentioned statute, I need not observe that it is the object of a proclamation to make known the existing law, and that it can neither make nor unmake law; but, in truth, the proclamation of 1861 is directed, and very properly, to two objects,—first, to declare that the provisions of the Foreign Enlistment act would be strictly enforced; and, secondly, not to prohibit the exportation of warlike stores, but to warn the subjects of the realm that if any subject carried contraband of war to either belligerent, he would incur the penal consequences of the law of nations, and would receive no protection or relief from those consequences (that is, from capture and condemnation) at the hands of Her Majesty. The proclamation has no effect whatever on the legality of this adventure.

"I am of the opinion, therefore, that the adventure between the bankrupt and the petitioner was a lawful contract, and that the ordinary rights of property result from it."

The Jurist, Vol. XI, Pt. 1, 1865, *p.* 400.

Dr. Lushington, in the case of *The Helen*, (*supra*,) approved the doctrine and decisions of the American Courts as expressing the true principles of international law.

That case was a suit in admiralty for wages by the master of a vessel employed in breaking the blockade of the Southern ports, and the defense was that the agreement was contrary to law, and could not be enforced by the Courts. Dr. Lushington said it was his duty to decide the questions involved, independently of the judgment of Lord Westbury in *Ex-parte Chavasse;* and he accordingly entered upon an elaborate examination of the subject in the light of the authorities and the principles of public law.

Dr. Lushington said:

"It is, I perceive, admitted on all hands that the Court must enforce the agreement with the master, unless it is satisfied that such an agreement is illegal by the municipal law of Great Britain. In order to prove this proposition, the defendants say that the agreement to break the blockade by a neutral ship is, on the part of all persons concerned, illegal, according to the law of nations, and that the law of nations is a part of the municipal law of the land—*ergo*, this contract was illegal by municipal law. Now, a good deal may depend on the sense in which the word 'illegal' is used. I am strongly inclined to think that the defendants attach to it a more extensive meaning than it can properly bear, or was intended to bear by those who used it. The true meaning, I think, is that all such contracts are illegal, so far that if carried out they would lead to acts which might, under certain circumstances, expose the parties concerned to such *penal consequences as are sanctioned by international law for breach of blockade, or for the carrying of contraband.* If so, the illegality is of a limited character. For instance, suppose a vessel, after breaking the blockade, completes her voyage home, and is afterwards seized on another voyage: the original taint of illegality, whatever it may have been, is purged, and the ship cannot be condemned; yet, if the voyage was *ab initio* wholly and absolutely illegal, both by the law of nations and the municipal law, why should the successful termination purge the offense?

"Let me consider the relative situation of the parties. A neutral country has the right to trade with all other countries in time of peace. One of these countries becomes a belligerent, and is blockaded. Why should the right of the neutral be affected by the acts of the other belligerent? The answer of the blockading power is: Mine is a just

and necessary war; (a matter which in ordinary cases the neutral cannot question;) I must seize contraband, I must enforce blockade, to carry on the war. In this state of things there has been a long and admitted usage on the part of all civilized States—a concession by both parties, the belligerent and the neutral—an universal usage which constitutes the law of nations. It is only with reference to this usage that the belligerent can interfere with the neutral. Suppose no question of blockade or contraband, no belligerent could claim a right of seizure on the high seas of a neutral vessel going to the port of another belligerent, however essential to his interest it might be so to do. What is the usage as to blockade? There are several conditions to be observed, in order to justify the seizure of a ship for breach of blockade. The blockade must be effectual, and (save accidental interruption by weather) constantly enforced. The neutral vessel must be taken *in delicto*. The blockade must be enforced against all nations alike, including the belligerent one. When all the necessary conditions are satisfied, then, by the usage of nations, the belligerent is allowed to capture and condemn neutral vessels without remonstrance from the neutral State. It never has been a part of admitted common usage that such voyages should be deemed illegal by the neutral State; still less that the neutral State should be bound to prevent them.

"The belligerent has not a shadow of right to require more than universal usage has given him, and has no pretense to say to the neutral, you shall help me to enforce my belligerent right by curtailing your own freedom of commerce, and making that illegal by your own law which was not so before.

"This doctrine is not inconsistent with the maxim, that the law of nations is part of the law of the land. The fact is, the law of nations has never declared that a neutral State is bound to impede or diminish its own trade by municipal restriction."

The English publicists have adopted these doctrines as expressing the existing public law of modern Europe and America.

Sir Travers Twiss expresses the principle in the language of the American authorities. He says:

"The transport of merchandise to the ports of a belligerent State is *per se* a perfectly *lawful act* on the part of a

neutral merchant. The right of the neutral to transport, and of the adverse belligerent to seize, are conflicting rights; and neither party can charge the other with a criminal act." (Law of War, Preface, xvii.)

Sir R. Phillimore, the first edition of whose work on International Law contained peculiar notions upon this subject, has, in his last edition, (1873,) admitted that his theory had not been justified by the practice of States. He says:

"The law was once tersely expressed by an English Foreign Secretary of State, complaining that from the shores of neutral England ships laden with munitions of war sailed to his enemy. 'Catch them, if you can,' was the answer of Lord Palmerston." (3 Phill., ed. 1870, p. 410.)

Mr. De Burgh, in his excellent work, has tersely expressed the principle:

"*Commerce on the part of a neutral with a belligerent constitutes no offense against the law of nations.*" (The Elements of Maritime International Law, p. 116.)

Professor Sir Edward S. Creasy, in his admirable summary entitled "First Platform of International Law," approves (page 572) the doctrines on this subject maintained by "the great statesmen who wisely and firmly guided the policy of the United States during the first twenty years after the recognition of their Federal Republic as an independent power."

Mr. Hall lays it down as an elementary doctrine of neutrality, that mercantile acts are not a violation of State neutrality, and shows that "*the policy of the United States, in* 1793, *constitutes an epoch in the development of the usages of neutrality*, which broadly distinguish between *national* and *private* acts in their relation to belligerent rights." (The Rights and Duties of Neutrals, p. 46, 19.)

Professor Sheldon Amos, in his edition of "Manning's Law of Nations," concurs in the views expressed in the able examination of the subject of contraband by Sir W. Harcourt in the celebrated letters of "Historicus." (Page 384.)

But English publicists and jurists are not alone in their acceptance of the American doctrines on the subject of contraband.

Those doctrines have been recognized as expressing the true principles of the law of nations by British statesmen.

Mr. Layard, the Solicitor-General, in a speech in the House of Commons, on the 22d of February, 1862, stated with admirable clearness the accepted rules of public law in regard to neutral trade in contraband of war, and the recognized distinction between that trade and transactions embraced by the Foreign Enlistment Act, as well as the effect of the British Proclamation of Neutrality of May 13, 1861. The principles stated by Mr. Layard on this occasion were afterwards, as we have seen, judicially affirmed, upon the same authorities as those on which he relied,—viz.: the great jurists of the United States,—by Lord Westbury and Dr. Lushington.

Mr. Layard's remarks, as quoted by Mr. Lawrence, (Wheaton, p. 813,) were as follows:

"I think it desirable that a few words should be said to correct a total misapprehension of a matter of law into which the honorable gentleman opposite has fallen. He implies by the terms of his notice of motion, and more distinctly stated in his speech, that all masters of British merchant vessels who may have run the blockade with articles contraband of war on board have been guilty of illegal acts, in violation of Her Majesty's proclamation, which the Government of this country, having their attention called to them, ought to have interfered to prevent, but had not done so.

"He has also suggested that the authorities of the port of Nassau must be subject to serious blame for having permitted ships under similar circumstances to call at that port and to take in supplies, and to have the benefit of calling and remaining there when they had on board articles contraband of war, which the honorable gentleman seemed to suppose that Her Majesty's proclamation had made it illegal for them to have on board, and which, therefore, they could not be permitted to carry without a violation of neutrality. In all these respects the honorable gentleman has totally misunderstood the law. This country is gov-

erned by law, and except as far as Her Majesty's Government have powers by law to control the action of private British subjects, whether the masters of ships or others, of course they are perfectly powerless in the matter.

"The only law which enables Her Majesty's Government to interfere in such cases is commonly called the Foreign Enlistment Act, and the whole nature and scope of the act is sufficiently and shortly set out in the title. It is 'An act to prevent the enlisting and engagement of Her Majesty's subjects to serve in foreign service, and the fitting out or equipping in Her Majesty's dominions vessels for warlike purposes without Her Majesty's license.' That act does not touch in any way whatever private merchant vessels which may carry cargoes, contraband or not contraband, between this country or any of the dominions of Her Majesty and any port in a belligerent country, whether under blockade or not; and the Government of this country and the Government of our colonial possessions have no power whatever to interfere with private vessels under such circumstances.

"It is perfectly true that in the Queen's proclamation there is a general warning at the end, addressed to all the Queen's subjects, that they are not, either in violation of their duty to the Queen as subjects of a neutral sovereign or in violation or contravention of the law of nations, to do various things, one of which is carrying articles considered and deemed to be contraband of war, according to law or the modern usages of nations, for the use or service of either of the contending parties. That warning is addressed to them to apprise them that if they do these things they will have to undergo the penal consequences of the statute or by the law of nations in that behalf imposed or denounced. In those cases in which the statute is silent the Government are powerless and the law of nations comes in.

"The law of nations exposes such persons to have their ships seized and their goods taken and subjected to confiscation, and it further deprives them of the right to look to the Government of their own country for any protection.

"And this principle of non-interference in things which the law does not enable the Government to deal with, so far from being a violation of the duty of neutrality,—which the Government are sincerely anxious to comply with,—is in accordance with all the principles which have been laid down by jurists, and more especially by the great jurists of the United States of America."

Lord Granville, in 1870, in reply to the position taken by Prussia in the late war with France,—that the furnishing of arms and munitions by the subjects of neutral powers to France was a breach of international law,—adopted explicitly the principles on this subject of the publicists and statesmen of the United States.

The correspondence between Lord Granville and Count Bernstorff, the German Ambassador, in 1870, was transmitted by Mr. Motley to Mr. Fish, and is published in the "Foreign Relations of the United States," 1870. (P. 177, *et seq.*)

The British Government on that occasion maintained the doctrine that arms and ammunition had always been considered to be articles of legitimate commerce by neutrals during war, and Great Britain claimed the right of her subjects to supply them to all belligerents, without distinction; just as Prussia claimed the same right in respect of the trade of her subjects with Russia during the Crimean war. "When did Prussia," said Lord Granville, "renounce the principles on which she acted in 1854 and 1855, to which she adhered, when she again occupied the position of a neutral, in the war waged by Austria with France and Italy, in 1859, and in the war between the Northern and Southern States of America, and to which she has formally given her sanction in the treaties with the United States of 1799 and 1828?"

(*e*) Among the publicists of Continental Europe who maintain the doctrine of the freedom of neutral trade in warlike materials, may be mentioned Bynkershoeck, (Q. J. P. LI, cap. 22,) Vattel, (Liv. 3, c. 8,) Azuni, (Droit Maritime de l'Europe,) Lampredi, (Du Commerce des Neutres, sec. 5, p. 53, ed. 1802,) Martens, (Precis du Droit des Gens., sec. 318,) Ortolan, (Diplomatie de la Mer, 11, 180,) Kluber, (Droit des Gens, sec. 288,) Bluntschli, (Le Droit International Codifé, sec. 765.)

2. As to LOANS OF MONEY by neutrals to a belligerent State,

we have seen that by the public law of modern nations they are included and governed by the principles that apply to the furnishing of military supplies, and that they do not constitute any international or municipal wrong on the part of neutral subjects engaged in such transactions.

Mr. Hall, adopting the law laid down by Mr. Webster, in 1842, on this subject, says that "money is, in theory and in fact, an *article of commerce* in the fullest sense of the word; and a belligerent no more dreams of complaining because the markets of a neutral nation are open to his enemy, than because they are open to the purchase of cotton. Mr. Webster laid down the rule on the subject in 1842 with great decision: '*As to advances and loans made by individuals to the Government of Texas or its citizens, the Mexican Government hardly needs to be informed that there is nothing unlawful in this, so long as Texas is at peace with the United States, and that there are things which no Government undertakes to restrain.*'" (Rights and Duties of Neutrals, p. 50.)

During the Franco-German war, both the French Morgan Loan and part of the North German Confederation Loan were issued in England; and it is, of course, a well-known fact that, during the war of the Southern Rebellion, the war loans of the United States were largely taken in England and other European countries.

The subscribers to the French, German, and American loans in neutral Europe were not guilty of any violation either of international or municipal law in these transactions.

3. The public law in regard to transactions between neutrals and belligerents in SHIPS AND VESSELS is well settled. The subject is presented with great clearness in the article previously cited in the *American Law Review* of January, 1871, on *Contraband of War;* and we do not understand that the doctrines there stated are impugned by the award or opinions of the arbitrators at Geneva.

The writer says:

"A ship, theoretically considered, may or may not be contraband. If on its way to a belligerent port for the purpose

of being sold to the belligerent, it will be contraband if it is adapted or readily adaptable for warlike use; equally so, doubtless, if it be adapted for the transportation of troops, or even, perhaps, of military material. Inasmuch, therefore, as very few vessels are not capable of being fitted and used for one or the other of these purposes, it may be laid down generally that ships will be pretty surely condemned as contraband of war. With regard to ships as with regard to all other descriptions of contraband merchandise, no restriction is placed by international law upon trade. The naked right to sell a ship of war to a belligerent is not interfered with. It may be declared as indubitable that the pure, unalloyed bargain and sale of a ship, even a ship of war, to a belligerent, is legal by the rules of international law; that such a ship is, however, contraband of war, and if captured after sale on her way toward delivery, or before sale on her way to a market where she is intended to be sold to a belligerent, she will be properly condemned. Neutrality laws have not been intended to change this state of the law, but only to present sufficient means for preventing its abuse. Our original proposition, that the doctrine of contraband of war does not operate as a restriction upon trade, remains correct, even in this matter of war vessels. The neutral is not called upon actively to interfere with commerce, but is called upon actively to prevent the use of his territory as the base of hostile operations." (American Law Review, vol. 5, p. 371.)

These views are in accordance with the decisions of this Court in the *The Santissima Trinidad*, 7 Wh., 283, and *U. S.* v. *Quincy*, 6 Peters, 445, and the decision of Judge Nelson in the case of *The Meteor*, arising out of the war between Spain and Chili.

The Continental jurists generally enumerate *ships of war* among contraband articles, and do not discriminate between the right of neutrals to furnish them, and their right to furnish other articles of direct use in war. Hubner, Martens, Azuni, Lampredi, and Heffter concur in this view.

A vessel sold or chartered to a belligerent Government, in a neutral port, and employed by the belligerent in the conveyance of contraband of war or passengers, or both, from the neutral to the belligerent port, does not become by reason of such employment a *transport* or *store-ship*, in the

meaning of the neutrality laws of the neutral State. Such vessels are liable to capture and condemnation as enemy's property, or as employed in the enemy's service, or, possibly, as contraband of war; but the neutral subjects who effect such sales or charters of vessel property are guilty of no infringement of the public law or the municipal law; nor does the neutral Government become responsible for such transactions to the other belligerent State.

3. During the late war, the United States availed themselves largely of this freedom of action, which their own priciples, when they were neutral, had so largely contributed to establish as the right of neutral nations.

The Government purchased, by their officers or agents, arms and military supplies of all kinds in very large quantites in England, France, Austria, and other neutral countries. And, in the report of the Secretary of War to the President of July 1, 1861, it is stated that a perfect battery of Whitworth six 12-pounder rifled cannon, with 3,000 rounds of ammunition, *the munificent donation of sympathizing friends in Europe, had been received from England by the Government of the United States.*

These transactions were very numerous and very large. It was estimated by the British Government, in presenting this subject at Geneva, that the extra supplies of warlike stores exported to the ports of the United States, on account of the Government, during the civil war, represented a value of not less than £2,000,000, of which £500,000 was the value of muskets and rifles alone.

In entering into these transactions in European countries, it was not supposed by the high officers of the Government of the United States that the Government was engaged in systematic violations of the law of nations, or the municipal laws of European States.

VII.

Belligerent Penalty, in every case of Contraband, Confiscation of the Peccant Property.

If transactions on the part of the citizens or subjects of a neutral State, by which a belligerent is supplied with articles of warlike use, constituted infringements of the law of nations and offenses against the law of the neutral State, it would not follow that the belligerent injured thereby would have the right to punish the neutrals engaged in such transactions by the seizure and forfeiture of any property belonging to them that might be found within the jurisdiction of the belligerent, or in the territory of its enemy.

The neutral subject who commits a breach of neutrality, or a non-neutral act, violates the law of his own country, and he is amenable for his offense to the law of his own country alone, except when actually taking part in the war as a combatant, when he is liable to be dealt with by the belligerent according to the laws of war.

The only right exercisable by the belligerent is that of capturing and confiscating, *jure belli*, the hostile *property involved in the particular transaction* which the belligerent may complain of as a violation of the neutral's duty. The neutral cannot be visited by the belligerent with personal punishment, nor can any other property, under the control of the belligerent, be seized, captured, or confiscated for his unneutral acts. The belligerent against whom a breach of neutrality is committed by the subject of a neutral State, seizes the *peccant property*, and confiscates it to his own use, *jure belli*, and *there* his right to affect the subject of the neutral State *terminates*, under the law of nations.

The only duty of the individual is to his own sovereign. There are no relations known to international law between a State and the subjects of another State. It knows only the relations between State and State. A neutral person who commits a non-neutral act offends, therefore, if at all,

against his own sovereign, and can be punished by him alone. The only right exercisable by the belligerent against whom the act is directed, is the right of preventing the injury by the capture of the particular property involved in the hostile transaction, and which has thus become impressed with a hostile character. The belligerent cannot go farther, and imprison, or otherwise punish, the offending neutral, if he comes under its control, or appropriate to its own use any other property of the neutral found within its jurisdiction. This would be to usurp a power which belongs to the neutral sovereign, and is not delegated, by the law of nations, to the belligerent.

2. These principles are illustrated by a class of cases in the Prize Courts, familiar to the student of international law.

The cases are treated of, by the text-writers, under the head of *Analogues to Contraband;* and they involve a consideration of the public law as to personal overt acts done by a neutral in aid of a belligerent; such, for example, as carrying hostile persons or papers, entering generally into the transport service of a belligerent, transmitting signals between two portions of a fleet, &c. In these cases the neutral directly intervenes in the war, and makes himself, in a sense, a party to it by rendering aid and assistance to one of the belligerents.

It was never supposed by any judge or jurist that the belligerent had power to do anything more than condemn the property of the offending neutral involved in the particular transaction, however flagrant may have been his misconduct, or however hostile may have been his intent.

In other words, the rights and remedies given to the belligerent, in that class of cases, where the express intention and design of the neutral solely is to aid and abet one of the parties to the war, are the same, substantially, as exist in the ordinary case of contraband, thus showing that the particular *intent* with which an act is done on the part of a neutral does not affect the character of the transaction as

between the neutral and the belligerent. This class of cases is represented by *The Friendship*, (6 Rob., 420,) *The Orozembo*, (Ib., 430,) *The Atlanta*, (Ib., 440,) where the vessels were condemned for unneutral intervention in the war, and as *de facto* enemy's property, and the general subject was much considered in the case of *The Trent*. The subject is exhaustively discussed in one of the ablest of Mr. Dana's Notes. (Wheaton, p. 637.)

The owner of property, in such relations to the enemy, is treated by the public law as impressed with the hostile character, in the particular service, and as respects the particular property involved in it. He is so far, and no further, impressed with a hostile character; and the property is thus subject to capture and condemnation by the belligerent as if it were enemy's property.

It must always be remembered that the ground and justification of belligerent rights against neutrals are the law of *self-defense;* and that those rights are not founded upon any principle of allegiance or duty due by neutral individuals to a belligerent State; and that this right of *self-defense* can be only exercised to the extent of depriving the neutral of the property which improperly augments the strength of the enemy; and the power to capture and confiscate *that* property constitutes the only hold the belligerent has on the neutral subject.

The belligerent right does not proceed upon the ground of the special *intention* of the neutral in the particular contraband transaction, and takes no cognizance of his intention as affecting the penalty to be applied. The injury is as great to the belligerent affected by the assistance to his enemy furnished by the neutral, when it is supplied with one intention, as it is when it is supplied with another. The intention constitutes no part of the offense to the belligerent, if offense it be considered; and the right of capture and condemnation does not proceed upon the character of the intention; and the penalty is inflicted without any reference to that matter.

PART II.

THE OWNERSHIP OF THE PROPERTY.

I.

Mr. Collie the Owner of the Cotton.

Alexander Collie, the original claimant, was the owner of the cotton in question, at the time of its capture in the city of Savannah, in December, 1864.

1. The following is the substance of the finding of facts: That for a period of about two years, during the civil war, Alexander Collie, a British merchant, residing and doing business, in his own name, in London, was engaged in fitting out, lading, and sending steamships to run the blockade of the ports of the Confederate States, which succeeded many times in making these voyages, carrying into some of those ports *general merchandise*, and also arms and other munitions of war; that the general merchandise was there *sold*, and the munitions of war were *delivered* to the Government of the Confederate States; and that the cotton, whose net proceeds are sought to be recovered in this suit, was purchased for Mr. Collie, by his agent in the Confederate States, sent out by him, in 1862, with moneys derived from the sales there made of the general merchandise above mentioned. (Rec., pp. 13, 18.)

This cotton is not found to have been purchased with moneys derived from sales of munitions of war.

The transactions, referred to in the findings of the Court, consisted in the shipment to the Confederate States of general merchandise, and also articles contraband of war, and the bringing back to England of return cargoes of cotton,

which were partly received from the Confederate Government in payment for the munitions of war, and other contraband articles, supplied to that Government, and partly bought for him, by his agent in the South, with moneys derived from the sales there made of the other merchandise.

The particular cotton now in controversy was bought for Mr. Collie, by his agent, with moneys so derived.

This agent was sent out by him in 1862; he purchased the cotton in the years 1862, 1863, 1864; and it remained in store at Savannah, until it was seized in December, 1864.

2. The rulings of the Court below, upon the request of the counsel for the Government for additional findings, (Rec., pp. 44, 45, 46,) are only important as confirming the original findings as to the ownership of the cotton in question by Mr. Collie.

The Court allowed the first request, to wit: "That Alexander Collie continued a member of the Manchester house of Alexander Collie & Co. after he removed his own residence to London."

The Court was asked, secondly, to find, that "other persons were jointly in business with Alexander Collie, in London, the style of the firm there being 'Alexander Collie & Co.'" This request the Court refused.

The Court was asked, thirdly, to find a number of pretended facts as to the source whence the funds which purchased this cotton were derived. The first sentence *only* of this third request was allowed by the Court; the rest was refused.

The sentence allowed is: "That other persons were interested with Alexander Collie in the enterprise mentioned in the second of the findings of facts already filed by the Court in this case." The relevancy of this finding is not perceivable. The Court *refused* to allow that part of the third request which alleged, that "the cotton of which the proceeds are the subject of this claim, although bought by Theodore Andreæ, the agent mentioned, was purchased with funds in part furnished by other persons so associated with Collie in

these adventures, through our blockade before mentioned." (Rec., pp. 45, 46.)

The remaining requests—to wit: first, fourth, fifth, etc.—were allowed by the Court below; but nothing in them in any manner qualifies the finding that Mr. Collie was the sole owner of the cotton here in controversy.

The sixth request allowed, was that "the vessels for the adventures aforesaid were bought with funds provided by Alex. Collie & Co., and in part by his friends, who subscribed to them in shares of £500 each. The cargoes were in part provided in the same way, and in part by shipments of the goods dealt in by subscribers; *i. e.*, as to those cargoes not provided for the Confederate Government and the State of North Carolina." The relevancy of this finding cannot be perceived.

The Court expressly refused to find, that this cotton was purchased with funds in part furnished by other persons interested with Mr. Collie in these adventures. If it had been so purchased, the fact would be immaterial. It would not have given the others any proprietary interest in the cotton, which was purchased for Mr. Collie, by his agent; and in him alone was the title vested; and by him alone has any claim been made to the proceeds.

3. Mr. Collie had no partner in his business in connection with the Southern States. The Court refused to find that other persons were jointly in business with him in London. Whether a partnership exists is a question of fact; and no such fact having been found, it is of course to be taken conclusively here that no relation of partners subsisted between Mr. Collie and any other persons, in respect to the merchandise taken to, or purchased in, the Southern States.

The attempt of the counsel for the Government to make some theory of partnership a feature in this case, in the Court below, was wholly abortive; and we suppose it will not be revived in this Court.

II.

The Validity of the Title.

We come now to consider the question discussed in the opinion of Judge Nott, in the Court below, as to the validity of the title of Mr. Collie to the cotton now in controversy, which was acquired, as we have seen, by purchase in the territory of the Confederate States, with the proceeds of sales of general merchandise exported from England by Mr. Collie in the course of his maritime commerce with that territory—Mr. Collie, at the time of the transaction, being a subject of the Queen of Great Britain and Ireland, personally and commercially domiciled in the country of his allegiance.

The views expressed by that learned judge, in his opinion upon this question, touching the validity of Mr. Collie's title to this property, were not shared in by the other judges of the Court of Claims who took part in the decision of the case at bar, and who concurred in the judgment dismissing the petition specifically upon the grounds that, by the transactions detailed in the finding of facts, Mr. Collie gave aid and comfort to the late rebellion, within the meaning of the Captured and Abandoned Property Act, and that he was not affected by the Proclamation of Pardon and Amnesty made by the President on the 25th of December, 1868. But, as the question of the validity of this title has been raised, and may be considered before the Court, by the course of the opinion of Judge Nott, it may be useful that we should dispose of that matter before proceeding to the objections urged by the other judges to the maintenance of this claim.

1. We desire to observe, though it will be found not very important, perhaps, in the view we shall take of the case, that the learned judge was under a slight misapprehension as to the findings of fact, as well as the proofs in the case, when he stated in his opinion that the particular cotton now in question was acquired "*for the purposes of blockade run-*

ning," if we are to understand by this that it was purchased with the intention and design to carry it out of the territory in violation of the blockade. There is no finding of fact to that effect; nor could there well have been such a finding, in view of the evidence in the Court below, which we may take the liberty, perhaps, of saying distinctly negatived the existence of such a purpose, and proved that the intention was to retain the cotton in store until the termination of the war.

So that the naked point really is, whether or not there is any principle of public or municipal law, applicable to the case, which can be deemed to affect the title of this property with invalidity, the property having been purchased, *pendente bello*, in the territory of the Confederate States, by a non-resident subject of a neutral State, with moneys derived from antecedent sales of general merchandise previously brought from the neutral country into the blockaded ports of the Confederate States?

Upon this question several observations may be made which, we think, will enable this Court without difficulty to perceive that the claimant, Mr. Collie, by this completed transaction of the sale and purchase of this cotton, acquired a valid and indefeasible title to the property, which is entitled to be recognized and upheld by all Courts of justice, and which could not be gainsayed by the Government of the United States, in any of its Departments, without violating those fundamental principles of public law which the United States are bound as a nation to observe and respect.

2. It is not understood that there is any denial, on the part of Judge Nott, of the right of Mr. Collie to enter into infra-territorial transactions of commerce in the Confederate States, and acquire title to movable property there by purchase from its owners. But if his opinion should go so far as to hold that the subject of a neutral State, domiciled in his own land, had no right to hold commercial intercourse with the insurgent States, and acquire the ownership of property there situated, and that their contracts there made are not to be up-

held in the Courts of the United States, as well as elsewhere, and that such a person was thus affected with the civil disabilities which affected persons residing in the loyal States, under the protection of the United States, in regard to intercourse and commerce with the insurgent States, we have only to observe that we fail to find any warrant for that opinion in the writings of publicists, or the decisions of this Court.

The principles of public law as to *trade by neutrals in the territory of a belligerent* are considered in Part I of this argument; and as no act of Congress in conflict with those doctrines was ever passed, we may assume, we think, that the Court will have no difficulty in holding that there was no law, public or municipal, which disabled Mr. Collie from acquiring ownership of property by purchase in the Confederate States.

Neither the general public law, nor the law of blockade, affected his contracts within the territory of the Confederate States with any disability.

Constantly, indeed, were claims on the part of neutrals to the ownership of cotton, and other property, purchased in the Confederate States, and brought out through Brownsville and Matamoras, sustained as valid during the war by this Court, and the other Prize Courts of the United States. The great case of *The Sir William Peel* (5 Wall., 517) is a notable instance in which a neutral's claim of ownership to property thus acquired was adjudged valid by this tribunal.

Nor was it ever contended, in any case, that the existence of the maritime blockade affected the general right which neutrals had to acquire property by purchase within the Confederate territory.

Mr. Collie, therefore, being under no disability to purchase this property, the question to be considered is, whether the title is affected by the fact, that the money by which it was purchased was derived from his maritime commerce with the blockaded ports.

3. But before discussing the question presented upon th

principles of public law which are applicable to it, let us observe that if that question were to be determined, as it certainly is not, by principles and rules of decision derived from municipal jurisprudence, applicable to transactions prohibited by law, it could not be maintained that the title of this property is affected by the fact that the money which paid for it was derived from previous transactions carried on in breach of the blockade, whether the property involved in those transactions consisted of articles contraband of war, or merely general merchandise.

Those transactions, as we have shown, were not illegal in the estimation of any system or description of law whatsoever; and they were in the lawful exercise of the legal rights of the claimant; but if it had been *otherwise*—if his transactions in breach of blockade and in the carriage of contraband had been expressly *prohibited* to the claimant by a valid statute—it would be impossible for any Court, proceeding upon settled principles of jurisprudence, to hold that the claimant could not acquire a valid title to property purchased with money derived from and in the course of those transactions.

No Court, we suppose, would refuse to give effect to executed contracts of sale upon the ground that the purchase-money of the property was realized through some previous illegal transactions having no direct connection with those contracts or the property to which they related.

The general rule, even with respect to illegal contracts, is, that the law leaves the parties to such contracts where it finds them ; (Whitfield *v.* U. S., 92 U. S. R., 169 ;) but the law never infects a legal contract with illegality on account of the illegal character of other transactions, distinct from and independent of the contract sought to be enforced. "This would be," in the language of Chief Justice Marshall, "to connect distinct and independent transactions with each other, and to infuse into one which was perfectly fair and legal in itself the contaminating matter which infected the other. This would introduce extensive mischief into the ordinary affairs and transactions of life, not com-

pensated by any one accompanying advantage." (Armstrong *v.* Toler, 11 Wh., 270.)

Accordingly, it was there held that, however strongly the laws—the municipal laws—might denounce the crime of importing goods from the enemy in time of war, money advanced for the purpose of defending a prosecution instituted in consequence of such illegal transportation was recoverable, although the fact of such importation was known to the person who advanced the money when the contract was made. The money was "advanced for a lawful purpose, and the promise to repay it is made on a lawful consideration. The criminal importation constituted no part of this consideration."

The doctrines of this case of *Armstrong* v. *Toler* have been followed and applied by this Court, whenever occasion arose, from that time to the present.

The authorities upon which it proceeded were reëxamined by Mr. Justice Nelson in *McBlair* v. *Gibbes*, (17 How., 232,) and it was there held that though a collateral contract made in aid of one tainted by illegality cannot be enforced, yet a *bona-fide* purchaser for value of an illegal claim, who has received the proceeds, cannot be compelled by the assignor's representatives or creditors to account for such proceeds.

"We all know," said Mr. Justice Story, in *Ocean Insurance Co.* v. *Polleys*, (13 Pet., 164,) "that there are cases where a contract may be valid notwithstanding it is remotely connected with an independent illegal transaction, which, however, it is not designed to aid or promote."

The more recent case of *Brooks* v. *Martin* (2 Wall., 79) contains an able presentation, by Mr. Justice Miller, of the doctrine of the difference between enforcing illegal contracts, and asserting title to money, or other property, which has been realized through or from such contracts; and the Court there held, that after a partnership contract, confessedly for illegal traffic, as against an express statute, had been carried out, a partner, who held the results of the illegal partnership business, was liable, in equity, to account for and divide the profits.

That is a very strong case to show that, under the municipal law, the turpitude of past transactions which have become accomplished facts does not infect with illegality other contracts, although they may be remotely connected with the illegal transactions, or interfere with the ordinary rights of property which have accrued from those transactions.

The decision in *Brooks* v. *Martin* was expressly founded upon the English cases of *Sharp* v. *Taylor*, (2 Phillips, Ch. 801,) *Tenant* v. *Elliot*, (1 B. and P., 3,) *Farmer* v. *Russell*, (7 Vesey, 473,) and *Thomson* v. *Thomson*. (Id., 29.)

It would not be claimed, therefore, in view of these authorities, if the municipal law of the United States had prohibited all maritime commerce, on the part of neutrals, with the blockaded ports, that there was any such connection between Mr. Collie's transaction in breach of the blockade and the executed contracts, under which title and possession of this cotton were obtained, in the ordinary course of trade within the territory of the Confederate States, as, even upon principles of municipal jurisprudence, would entitle any Court to infuse into the latter transactions, to use the language of Chief Justice Marshall, "the contaminating matter which infected the other."

This would not be a question as to the enforcement of any contract in relation to property, alleged to be illegal in its inception, or even of establishing rights of property asserted to have arisen from transactions in violation of law. The contracts under which possession of the cotton was obtained, were completed contracts of sale and purchase, fully executed by vendors and vendee; and no judicial aid is involved, or is necesssary to give the vendee the full benefit of his purchase.

The previous transactions which have been assumed, for the purposes of the argument, to have been illegal, had become accomplished facts, and could not be affected in any manner by giving effect to the contracts which are drawn in question; and no right is even asserted as having arisen

from those transactions which constituted, indeed, no part of the consideration of the present contracts.

The doctrines of municipal law, therefore, which preclude a Court of justice from rendering assistance to a party to enforce contracts the consideration of which is either wicked in itself or prohibited by law, or which grow immediately out of illegal acts,—doctrines applied by this Court in the cases of *Hananer* v. *Doane* (12 Wall., 342) and *Hananer* v. *Woodruff* (15 Ib., 439),—furnish no rule or decision which would render it the duty of any Court, proceeding upon principles of municipal jurisprudence, to refuse to give effect to the contracts in question as vesting the ordinary rights of property. Indeed, it may be correctly said that the refusal, on the part of any Court, to uphold such contracts and give effect to the title transferred by them, would constitute what in public law is known as a *denial of justice*, and would, in fact, amount to judicial confiscation of property, without authority and in violation of law, and contrary to the fundamental principles of natural right.

III.

Transactions Lawful under the Public Law.

The argument thus far, upon the question of the title of this property, has proceeded upon the hypothesis that the transactions, in the way of maritime commerce, with the blockaded ports, carried on by Mr. Collie, were not transactions in which he was permitted to engage; and it has been shown that, even upon this theory, and applying rules derived from the ordinary municipal jurisprudence as to acts prohibited by law, the title of the property could not be infected with invalidity. But we do not concede—on the contrary, we deny—that the transactions of Mr. Collie, in the way of his maritime trade and commerce with the Confederate States, were prohibited by or in violation of any law, or contrary to any public policy whatsoever; or that principles borrowed from municipal jurisprudence are to

furnish the rule of decision by which the validity or legality of those transactions are to be adjudged by this Court; or that, in determining the character and effect of these transactions, the Court would be authorized to apply any doctrines not founded upon the public law of nations, which alone defined his rights in respect to maritime commerce with the Confederate States. As Mr. Collie's transactions, in course of that commerce, were legal transactions, which cannot be impeached by or under the authority of the United States, so property acquired by him in the course of, or by means of, those transactions, in the territory of the Confederate States, was held by a title entitled to be universally recognized as valid and indefeasible.

1. We observe, at the outset, that the CAPTURED AND ABANDONED PROPERTY ACT of March 12, 1863, leaves the primary question of the claimant's *ownership* of the property to be determined, in each case, by the application of such principles of jurisprudence as are properly applicable to the facts of the particular transaction, through which the title is asserted to have been acquired, in view of the juridical nature of the transaction, as derived from the juridical relations of the claimant to the United States, and the hostilities which were being prosecuted for the suppression of the rebellion.

The rules of decision which may be applicable to cases of claims on the part of citizens of the United States, or aliens domiciled in the United States, under obligations of fidelity and obedience to the Government of the United States, are, plainly, very different from those which can be legally applied in cases of claims preferred by aliens *domiciled in their own country*, who never owed allegiance of any kind to the United States, and whose transactions with and in the territory of the rebellion were carried on under the protection of the public law.

(*a.*) The former, though residing in the Confederacy, could not enter into transactions which gave aid and assistance to the rebellion without a breach of their duty of alle-

giance, and becoming amenable to the laws of the United States for the punishment of that offense; and their rights of property, dependent on such transactions, the Court has said, will not be upheld. This was the decision in *Sprott's Case*, (20 Wall., 463,) and *Whitfield's Case*, (2 Otto, 165.)

The same principle receives another application in cases where rights of property are asserted by citizens, or others residing under the protection of the United States, which are shown to have been derived from transactions involving intercourse and trade with the hostile territory of the Confederate States.

All unlicensed trade, or commercial intercourse, on the part of persons residing under the protection of the Government of the United States, with that territory, was an offense against the municipal sovereignty of the United States, independently of the express prohibition in the fifth section of the Non-Intercourse Act of July 13, 1861; and necessarily, therefore, no rights of property could result from contracts attempted to be entered into by such persons in the course of such trade or commercial intercourse. This is the decision in a multitude of cases adjudicated by the Court under the Captured and Abandoned Property Act. (U. S. *v.* Lane, 8 Wall., 185; U. S. *v.* Grossmeyer, 9 Ib., 72; U. S. *v.* Montgomery, 15 Ib., 395; U. S. *v.* Lapine, 17 Ib., 602; Mitchell *v.* U. S., 21 Ib., 350; Desmare *v.* U. S., 93 U. S. R., 611.)

In all cases of the class thus mentioned, which bring into view the commercial transactions of persons residing within the territory, and, therefore, under the allegiance of the United States, the legality of such transactions must be determined with reference to the municipal laws, and by the principles furnished by the municipal jurisprudence of the United States, which defined the juridical nature of those transactions, and the juridical relations of the parties to the Government of the United States, and the contest in which it was engaged.

(*b.*) But when the Court is called upon to consider the commercial transactions of the subjects of neutral States, domiciled in their own country, with and within the hostile

territory, rules of decision drawn from a very different system of jurisprudence are required to be applied.

Such persons owed no allegiance, permanent or temporary; to the Government of the United States. The municipal law did not and could not interfere with their trade with the Confederate States; and no transactions, on their part, in the course of that trade, could render them amenable to the United States as for treason, or treasonable misdemeanor, or any other municipal offense.

In the case, therefore, of the claims of subjects of neutral States, domiciled in their own country, asserting title to property acquired through trade with the Confederate States, the municipal laws and jurisprudence of the United States, applicable to the claims of persons owing permanent or temporary allegiance to the United States, have no application to questions as to the legal ownership of such property, and can furnish no rules of decision for the determination of those questions. Therefore, in that class of cases arising under the Captured and Abandoned Property Act, the Court is required to adjudicate questions of title and ownership by the application of the only system of jurisprudence which defines the rights of the subjects of neutral States in regard to trade with a belligerent power; that is to say, by the application of the principles and rules of *international* law.

(*c.*) It will be further observed, in this connection, that the Government of the United States never attempted to prohibit or restrict, by any municipal statute, intercourse and commerce by the subjects of neutral States with the Confederate States—the Non-Intercourse Acts passed by Congress being applicable only to trade between citizens, and persons residing under the protection of the United States, and the inhabitants of the hostile territory. (Acts July 13, 1861, sec. 5, 12 Stats., 257; July 2, 1864, sec. 4, 13 Ib., 375.)

As the trade of neutrals with that territory was lawful under the law nations, so also it was carried on without impeachment by any statute of the United States; and their transactions were wholly unaffected, therefore, by any municipal legislation of the Government.

IV.

The Blockade of the Confederate Ports a Belligerent Blockade.

Commerce, maritime or otherwise, by the subjects of neutral States with and within the Confederate States, being thus free from any statutory prohibition or restriction, on the part of the Government of the United States, the question is, whether anything that was done by the United States, in the exercise of their belligerent rights, had the effect to render maritime trade carried on by neutrals, domiciled abroad, illegal, or any transactions, on their part, in the course of such trade, unlawful. The only thing that was done by the Government to affect the commerce of neutrals was to establish a maritime blockade of the coast of the Confederate States.

1. Any doctrine which holds that commerce carried on by neutrals from their own country, whether in contraband of war or other property, with the blockaded ports, was unlawful, and is liable to be so treated by the Courts of the United States, in deciding questions of ownership, in cases arising under the Captured and Abandoned Property Act, will be found, on examination, to proceed upon the theory that the maritime blockade of the Confederate ports, established by the United States in 1861, operated with the effect of a *municipal prohibition* of maritime trade by neutrals with those ports, and that such trade, therefore, is to be treated as carried on in violation of the municipal law of the United States. This theory, in turn, it will be clearly perceived, by every one who has paid attention to such subjects, proceeds and is bottomed upon the false idea that the blockade was some sort of a *pacific blockade*, and not a *belligerent blockade*, established and maintained solely under the authority of the law of nations.

If anything, however, is to be regarded as settled beyond possible controversy, as matter of history and jurisprudence,

it is that the blockade of the Confederate ports was, as respects neutral States, and their subjects, a blockade which had in it no particle of *municipal sovereign right*, but was wholly and purely a *belligerent* blockade, which had, and could have, only the operation and effect allowed to a blockade, *jure belli*, in a public war between two foreign powers.

Commercial transactions by neutrals, involving maritime trade with the blockaded ports, are, under the public law, perfectly legal transactions, and are subject to no restrictions whatever as violations of the rights of the blockading belligerents. Rights of property, therefore, acquired by neutrals through their maritime commerce with the blockaded ports, are validly acquired, and entitled to universal recognition.

2. Running through and vitiating all the reasoning employed to sustain that view of the blockade, which would treat it as having the operation and effect of a municipal interdict upon trade with the Confederate ports, and not a belligerent blockade under the law of nations, is the fallacious assumption that the Government of the United States, under the public law, could exercise rights of sovereignty, or what Sir Travers Twiss calls the *right of empire*, over the Confederate territory, while in the firm possession of the hostile power, in respect to matters of *neutral commerce* with the ports in that territory, or that the laws of the United States, during that period, had any force or operation within that territory, with respect to the subjects of neutral States engaged in trade and commerce from their own country with the Confederate ports.

The judicial and diplomatic authorities on this subject are referred to in a previous part of this argument. (Part I, 2nd Point.)

From the time of Grotius, it has been recognized as a fundamental doctrine of public law, that firm possession of territory by a lawful and recognized Government, or by an usurped and *de facto* Government, is accompanied by the right of sovereignty or empire throughout the limits of the territory, so far as all foreign States are concerned. The

doctrine is, that the exercise of empire, as between nations, is an incident of territorial possession. Empire or sovereignty is in fact a primary territorial right, which is obtained when dominion over the territory is acquired, and ceases when dominion over the territory is lost. (Grotius, *de Jure B. et P.*, L. 11, c. 3, sec. 4; Vattel, *Droit des Gens.*, L. 1, sec. 205.)

No more instructive instance of the application of this doctrine can be found, for the purposes of the present question, than the decision of this Court as to the international effect of firm possession of territory acquired in war by a belligerent power, in the case of *United States* v. *Rice*, (4 Wh., 253,) involving the question of the right of the Government of the United States to claim duties on goods imported into *Castine* during the British occupation.

The argument on behalf of the claim of the Government was, that this was American territory, notwithstanding the hostile occupation, and that the laws of the United States, never having been repealed, were in force there, as much during that occupation as before and after, and affected the transaction of the importation of the goods and the property involved in that transaction. The question before the Court, therefore, was, did the laws and public policy of the United States extend to this transaction and this property? The Court said that they did not; and that the question was too clear, upon general principles of public law, to require any aid from authority.

Mr. Justice Story said:

"By the conquest and military occupation of Castine, the enemy acquired that *firm possession which entitled him to exercise the fullest rights of sovereignty over that place.* The sovereignty of the United States over the territory was, *of course*, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no

other laws could be obligatory upon them ; for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants were subject to such duties only as the British Government chose to require. Such goods were, in no correct sense, imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not and could not change the character of the previous transactions. *The doctrines* of *the* JUS POSTLIMINI *are wholly inapplicable to the case.* The goods were liable to American duties when imported, or not at all. That they were not so liable, is clear from what has been already stated ; and *when, upon the return of peace, the jurisdiction of the United States was reassumed, they were in the same predicament as they would have been if Castine had been a foreign territory added by treaty to the United States, and the goods had been previously imported there.* In the latter case, there would be no pretense to say that American duties could be demanded ; and, upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority."

Upon this ground the United States resisted the attempts of Spain, during her war with her American colonies, to exercise her pretended sovereignty, by enforcing against neutral commerce her municipal regulations as to foreign trade with those colonies. Upon this ground, during civil war in Peru, the United States maintained the right of their citizens to carry on trade, under the authority of the *de facto* Government in possession of the territory where their commerce was conducted. Upon this ground foreign nations protested against the United States undertaking to prohibit or interdict foreign trade with the Confederate ports; and the United States acquiesced in their remonstrances.

The ground in all these cases was, that by the hostile occupation, the *de facto* governments acquired that *firm possession*, which, Judge Story said, enabled it "*to exercise the fullest rights of sovereignty*," so far as foreign nations and their subjects engaged in trade were concerned.

Let it be supposed that the Government of the United States had established a maritime blockade of the port of Castine, in Maine, during the occupation of that territory by the British forces in the war of 1812. That it would have been competent for them to blockade that port, is not questionable. It was, in effect, the very proposition decided by this Court in *The Prize Cases*. Suppose a question had arisen in a Court of the United States, after the termination of the war, as to the right of a French citizen to acquire title to movable property in Castine, by maritime commerce carried on with that territory, thus in the hostile occupation of the British forces, and blockaded by the United States. The doctrine, and the very language of Judge Story, in *United States* v. *Rice*, would have determined that the *de jure* sovereignty was suspended by the *de facto* sovereignty of the hostile power in occupation of the territory, and that, for all commercial purposes, so far as neutrals were concerned, it was no part of the territory of the United States, and that, therefore, the laws and public policy of the United States could not attach to the transactions of a French subject, in the course of his commerce with Castine, and the property connected with those transactions.

V.

The Law of Blockade the same in a Civil War as in a Foreign War.

The Government of the United States, when it set on foot a blockade of the Confederate ports, acquired no rights with respect to neutral commerce with those ports, by reason of its *de jure* sovereignty over the territory, that it would not have possessed if they had been the blockaded ports of an enemy in a foreign war. The principle is briefly stated by Mr. Lawrence, thus: "*The law of blockade does not differ in civil war from what it is in foreign war.*" (Wheaton, p. 846.)

1. The right of the United States to enforce the blockade by the maritime capture of neutral property, depended upon the fact, that, under the public law, the *de facto* sovereignty of the Confederate territory, and ports, had, by the firm possession of the insurgent power, passed out of the hands of the United States. If the actual sovereignty of that territory had been exercisable by the Government, it could not have set on foot and maintained *any blockade whatever*, as against neutral intercourse; for it is a fixed principle of public law that there can be no blockade of a port, as respects neutrals, where the same party is the *blockading* and *blockaded* power. The object of a blockade, as of all other acts of war, being to reduce the enemy to submission, the blockade terminates, *eo instanti*, with the conquest and occupation of the port, and the consequent transfer of the sovereignty of the port to the blockading power.

Nor could the United States have captured on the high seas any warlike supplies belonging to neutral subjects destined to the Southern ports, if the Government had been in the exercise of the rights of sovereignty over these ports. The same principle applies in the case of contraband, as in the case of blockade. The property must be destined to a place which is not, at the time of capture, in the possession and under the sovereignty of the capturing belligerent, to render the capture lawful.

These propositions will be found adjudged by Lord Stowell in the great cases of *The Lisette* (6 Rob., 374) and *The Trende Sostre* (Ib., 390.)

It follows, therefore, that the sole foundation of the international right of the United States to exercise the powers of war on the high seas against neutral commerce with the insurgent ports, whether that commerce consisted in the transporation of warlike stores or general merchandise, was the situation of those ports as under the jurisdiction and sovereignty of the Confederate power, and not under the jurisdiction and sovereignty of the United States. It was this alone that obliged neutral nations to submit to the

capture on the high seas of the property of thir subjects destined to the Confederate ports.

2. What would have been the rights of the United States as against neutral commerce, if there had been no effective blockade of the Confederate ports?

It is plain from what has been said, that, except in articles contraband of war, neutral commerce would have been *absolutely free* from all limitations or restrictions on the part of the Government of the United States. Neutrals could have carried on their general trade with those ports as freely, as fully, as legally, as with the ports of Germany, or France, or Holland, or Russia. Neither on the high seas, nor within the territorial waters of the Confederate States, could the United States have captured a single neutral ship, with a cargo of general merchandise, destined to a Confederate port. No more within the three-league distance from the shore, than on the high seas, could the United States have exercised any rights of seizure or capture against such property; for, having no dominion over the territory, no rights of sovereignty could have been exerted by the Government against neutrals within the territorial waters of the Confederacy; nor could it have exercised any rights of belligerency against the general commerce of neutrals, any more within the territorial waters than upon the main ocean, in the absence of a blockade, while the ports were in the possession of the insurgent power.

3. When the United States reconquered and reoccupied the Confederate ports, their belligerent rights terminated, and their rights of sovereignty attached as against the subsequent trade and commerce of neutral States with those ports, which resumed their ancient character, in fact and law, of ports of the United States. The United States could no longer maintain a maritime blockade, and capture and condemn neutral property, found on the ocean, on its way to those ports, while they had the right to provide, as they did provide, such municipal regulations as they saw fit with

regard to neutral commerce with them, not only in articles of warlike use, familiarly called contraband of war, but also in general merchandise.

Accordingly, after the reoccupation of the ports of Beaufort, Port Royal, and New Orleans, the President issued his Proclamation of May 12, 1862, as he stated in pursuance of the authority vested in him by the fifth section of the act of July 13, 1861, declaring that commercial intercourse was to be carried on with those ports, subject to the laws of the United States, and in pursuance of the regulations prescribed by the Secretary of the Treasury. (12 Statutes at Large, Appendix.)

During the hostile occupation, the trade of neutrals with the ports was carried on under the law of nations, subject only to the belligerent rights of the United States. After the reconquest, that trade was carried on under such municipal regulations as the Government saw fit to impose, and was subject to the sovereign municipal rights of the United States. They could exclude articles of warlike use, or any other property, from lawful commerce with the ports; but no regulations thus imposed could be enforced against neutrals by the seizure or capture of their vessels or cargoes beyond the territorial navigable waters of the Southern coast. The doctrine ought to be regarded now as settled, that municipal regulations cannot be enforced by a Government, against foreign commerce, in peace or war, beyond its territorial maritime jurisdiction. (2 Phillimore, 237; Lawrence on Visitation and Search, 73, 79; The Louis, 2 Dodson, 110; The Antelope, 10 Wh., 122; The Mariana Flora, 11 Ib., 42; the case of The Cagliari, State Papers, 1857–'58, p. 326; and see the great discussions in the opinions of the Judges in the recent case of The Queen *v.* Keyn, the case of the *Franconia*, L. R. 2 Exch. Div., 63–252.)

VI.

The Transactions not Affected by any so-called War Policy.

The learned Judge of the Court of Claims, who dissented on the question of ownership from the other judges, devotes much space in his opinion to discussing what he terms, borrowing a phrase of municipal jurisprudence, the *war policy* of the United States; and while he is unable to find any statute of the United States which prohibited, or attempted to prohibit, Mr. Collie from carrying on his maritime commerce with the Confederate ports, and while he, perhaps, does not deny that Mr. Collie had the right, under the law of nations, to carry on his commerce with those ports, yet finds, in what he describes sometimes as the war policy, and sometimes as the national policy, of the United States, a right on the part of the Judicial Department of the Government to infect the transactions of Mr. Collie, in the prosecution of his maritime commerce with the insurgent ports, with some sort of illegality, and to treat them as, in some sort, unlawful against the United States.

If the foregoing argument is sound, there can be no doubt, we think, that all views of this nature are founded upon an erroneous theory of the international relations of the subjects of neutral powers, to the hostilities and the territory of the Confederate States, at the time of the transactions.

In its belligerent character against neutrals, the Government of the United States had *no* war policy, and *no* national policy, as distinct from belligerent powers and belligerent rights. It had belligerent *rights* which were *strictissimi juris*, and to be exercised in conformity with international law, and the usages of civilized warfare.

What the letter of the code of international law did not give, it had not, and what it did not acquire by the exercise of its rights under that code, during the war, it cannot claim after the war.

These principles are imbedded deep in the system of public jurisprudence, and might be illustrated by a thousand examples from diplomatic and judicial history.

They account—it might rather have been said by the learned judge of the Court below—for the fact that no cases have ever occurred where Courts have asserted what is called a war policy after a war, as against the subjects of neutral nations, who during the war remained within the jurisdiction, and under the allegiance, of their own Government, in respect to transactions accomplished during the hostilities. The case of *Hannay* v. *Eve*, (3 Cranch, 242,) referred to by him, was not a case in which the Court enforced any policy of the Government against the subject of a neutral State, but where the Court, in the case of one who had been the subject of a hostile power, enforced a statute providing a rule with respect to the war against the public enemy.

The transaction there considered was between enemies, and was in violation of an express statute made in aid and furtherance of the hostilities against the property of the subjects of the hostile nation.

The general maxims referred to by the learned judge are doctrines purely of municipal jurisprudence, and are applied to transactions between subjects of the belligerent State and the enemy. As has been shown, a declaration of war operates as a municipal prohibition against all intercourse by persons subject to the belligerent State with subjects of the other belligerent; and the "contracts against war policy," referred to by Bell in his *Commentaries*, are contracts by individual members of the nation with the enemy, the making of which constitutes a municipal offense, punishable as such by the Government, because it is a breach of the allegiance of the citizen under the municipal law. But neutrals violate no municipal law of the belligerent, and no rule of the general public law, when they carry on their commerce with the other belligerent. The commercial transactions of neutrals are not affected with any turpitude in the estimation of the municipal law, or the general public law. The municipal law has nothing to do directly with those transactions, and the

public law treats them as legal and moral transactions from which valid rights of property arise the world over.

When this Court has spoken of contracts as "tainted with the vice of the rebellion," it has done so with reference to contracts on the part of persons owing allegiance to the United States, which were made in violation of their duty of fidelity and obedience, and the making of which constituted, therefore, an offense against the United States. This was the character of the claimants, and the character of the contracts, in *Sprott's Case* and in *Whitfield's Case*. The contracts there in judgment were illegal contracts—illegal under the municipal law of the United States, which was the law governing the parties and the transactions. The contracts there considered were made with the Confederate Government, which was, as to the claimants in those cases, only organized treason. In respect to neutral States, and their subjects, residing in their own country, the character of the Confederate Government was determined by the public law, which regarded it, in the language of Judge Story, as a "belligerent nation."

While it was undoubtedly the policy, in the sense of the interest and object, of the United States, to cut off all commerce with the insurgent territory from without, it could only be enforced as to neutrals by establishing a blockade, and capturing and confiscating vessels and cargoes found on the ocean in the act of violating that blockade; and any attempt to otherwise enforce that policy by judicial action, or otherwise, would involve an infringement of the public law of nations.

VII.

The Jus Postliminii does not Apply to the Case.

The legal character and effect of the transactions, on the part of Mr. Collie, are to be adjudged exclusively, in the estimation of public jurisprudence, by the law which was applicable to them at the time they occurred, and the subsequent restoration of the jurisdiction and sovereignty of the United States over the territory involved, under the law of

nations, no such consequence as the invalidation of any rights of property vested or acquired through those transactions;—in other words, the doctrine of the *jus postliminii* has no application to the case, as was adjudged by this Court in the case of *United States* v. *Rice*, (4 Wh., 255.)

The decision of this Court in that case is cited by Dr. Phillimore as establishing, as a fundamental doctrine of international law, that the resumption of the authority of a Government over territory once in the hostile possession of its enemy (and the doctrine is equally applicable in the case of neutrals to a civil as to an international war) cannot change the character of past transactions, or disturb rights of property thereby acquired. He says:

"Even in cases of conquest, it is very unusual for the conqueror to do more than to displace the sovereign and assume dominion over the territory. The modern usage of nations, which has become a *law*, would be violated, that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled." (3 Phill. Int. Law., 742.)

No Government able to compel observance of public law would submit to have the rights of its subjects, legally acquired, retroactively affected by an *ex post facto* application of laws to which its subjects owed no fidelity or allegiance, and which were in fact suspended by intervening war at the time those rights were vested.

The language of Judge Story, in the case of *Castine*, may be applied almost literally to the present case. When, upon the return of peace, the jurisdiction of the United States was reassumed, the property in question was in the same predicament as it would have been if the Confederate States had been a foreign territory ceded by treaty to the United States, and the transactions had previously occurred, and the property had been previously acquired, in that territory.

PART III.

THE RIGHT TO RECOVER THE PROCEEDS UNDER THE ACT OF MARCH 12, 1863.

I.

The Captured and Abandoned Property Act.

We come now to consider—in the light of the general public law of nations, the usages of civilized warfare, and the decisions of this Court—the question arising upon the construction and effect of the third section of the Captured and Abandoned Property Act of March 12, 1863, which authorizes and provides for judgment of restoration of the net proceeds of property captured in the ownership of a petitioner preferring his claim thereto in the Court of Claims, upon it appearing that the petitioner never gave "*aid or comfort*" to the late rebellion. The general proposition, therefore, to which we now invite the attention of the Court is, that the original petitioner, Mr. Collie, never did by any of the transactions in which he was engaged during the civil war, as set forth in the record, give "aid or comfort" to the rebellion, according to the true construction, and within the just meaning, of the statute of 1863, and that judgment must, therefore, be awarded the present claimant, (as representing the bankrupt estate and creditors of Mr. Collie,) for the net proceeds of the cotton now in controversy in the Treasury of the United States.

1. It would seem scarcely necessary to observe that the right of this claimant to the restoration of the proceeds of the property now in controversy, through the judgment of the Court of Claims, depends solely upon the just construction and effect of the Captured and Abandoned Property Act of March 12, 1863, in connection with the provision in the

2d section of the Act of July 27, 1868, which authorizes any alien to prosecute claims against the United States in the Court of Claims, when the Government of which he is a citizen or subject accords to citizens of the United States the right to prosecute claims against such Government in its Courts.

It has been finally settled by the Court, that by "petition of rights" the British Government accords to citizens of the United States the right to prosecute claims against it in its Courts, and, therefore, that British subjects, if otherwise entitled, may prosecute claims against the United States in their Court of Claims. (O'Keefe's Case, 11 Wall., 178; Carlisle's Case, 16 Wall., 156.)

There can be no just pretense that if the claimant is entitled to the restoration of the proceeds of the property now in controversy, by the just construction and effect of the Act of March 12, 1863, there is anything in the provisions of the 12th section of the Amended Court of Claims Act of March 3, 1863, which constitutes an impediment to the recovery of those proceeds in the present suit.

It is manifest that the provisions of the 12th section of the Act of March 3, 1863, have no application to proceedings instituted in the Court of Claims for the recovery of the proceeds of captured or abandoned property under the authority conferred by the Act of March 12, 1863, and that they neither affect the right granted to the owners of the property embraced by that Act, nor limit in any manner the jurisdiction or power of the Courts of Claims to enforce or effectuate that right.

2. The Captured and Abandoned Property Act expressly provides for the restoration of the net proceeds of captured property, belonging to any person who never gave "aid or comfort" to the rebellion, in the sense in which those terms are employed in the statute.

It is well observed by Mr. Justice Nott, that "the '*aid or comfort*' which would form a bar to the claimant's recovery is the '*aid or comfort*' defined and intended by the

Abandoned or Captured Property Act; and that '*aid or comfort*' the Supreme Court has interpreted, in the case of aliens as of citizens, to be the breach of allegiance constituting an offense or crime." (Opinion of Nott, J., Rec., p. 42.)

It has never been suggested, as far as we know, in any of the multitude of cases adjudicated by this Court under the Captured and Abandoned Property Act, that a claimant, entitled to recover by virtue of the right conferred by *that* statute, was or could be precluded from such recovery in the Court of Claims by anything contained in the 12th section of the Amended Court of Claims Act.

3. It is plainly observable that the whole subject of the administration and restoration of captured and abandoned property, under the authority of the United States, was intended to be comprehended and regulated by the Act of March 12, 1863.

That Act was a rule of capture enacted by Congress under its constitutional power "*to make rules concerning captures on land and water*"; and it was intended to regulate all military captures, in the enemy's territory, during the recent hostilities, and the disposition of all property involved in such captures.

The *status* of all private property captured under the authority of the United States on land, in the revolted territory, is absolutely determined by the Act of March 12, 1863.

The will of Congress as to that species of property is expressed by that statute; and that will *is the will of the nation.*

This is the doctrine of the great case of *Brown* v. *U. S.*, (8 Cranch, 126,) where the Court held that, under our Constitution, a state of war does not operate to vest the property of the enemy on land in the Government, but has the effect only of vesting a right to seize and confiscate such property, the assertion of which depends on the will of the sovereign power; and that, in this country, Congress, with reference to this subject, exercises the sovereign power.

Chief Justice Marshall said:

"That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers, but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of Government, is fairly deducible from the enumeration of powers which accompanies that of declaring war. 'Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.' It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water is to be *confined* to captures which are *exterritorial*. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to Congress of the power in question as an independent substantive power, not included in that of declaring war."

Whatever might have been the extreme rights of war as to private property of enemies in the insurgent territory, while occupied or controlled by our military forces, Congress did not think proper to exercise them, nor would it have been competent for any other authority to do so, as decided in *Brown* v. *United States*.

Congress, instead of exerting those extreme rights which war confers, and recognizing the truth of what is said by the great Chancellor Kent, (a jurist of whom Sir W. Harcourt has said that he is *never* wrong,) that the conqueror who seizes private property on land "*for the sake of gain*, is sure to meet with indignant resentment, and to be held up to the *general scorn and detestation of the world*," Congress, by the Act of March 12, 1863, as expounded by this Court, declared that private property seized in the hostile territory should not be *booty of war*, but should be restored, after pacification, to its owners, as provided in that Act.

This Court has solemnly adjudged that the title to the proceeds of the private property which came to the possession of the Government by capture or abandonment, was in *no case* divested out of the original owner, and that

under the Act of March 12, 1863, the United States became the trustee of the proceeds for those owners, whether loyal or disloyal, and held them for the latter until pardoned by the President, or until Congress should direct the proceeds to be restored to them. (U. S. *v.* Klein, 13 Wall., 142, 150.)

In the view which this Court has taken of the Act of 1863, the effect of disloyal conduct, on the part of the owner of any property, seized and sold under the statute, was to create a mere *disability* to maintain in the Court of Claims a suit for the recovery of the proceeds in the Treasury, which was capable of being removed, and was removed, by the pardon of the owner.

Such being the interpretation placed upon this Act of 1863 by this Court, it is the settled law of the land, as to property seized and sold under that Act, that there was, by the fact of capture, no legal divestiture of the title of the private owner, in *any* case, so as to impress upon the property, or its proceeds, the character or quality of prize or booty of war to the United States. The statute thus construed is in perfect harmony with the modern public law of civilized nations, and saves our country from the disgrace and ignominy which would attach to its name and character, among the nations of the earth, if it ever had been in the contemplation of its legislation that its treasury should be enriched by military spoliation of the private property even of its enemies.

4. It follows from all that has been decided by this Court in relation to the Act of March 12, 1863, that the fact that "aid or comfort" was given to the rebellion by the owner of any captured property, is not a matter which can properly be said to go to the jurisdiction of the Court of Claims.

The only conclusion to be drawn from the decision of this Court in Klein's Case, (13 Wall., 143,) in regard to the unconstitutional legislation in the appropriation bill of 1870, is, that the fact of giving "aid and comfort" did not, in any case, interfere with the jurisdiction of the Court of

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Claims, but affected only the right of the owner to *invoke the jurisdiction* of the Court, by imposing upon him a personal disability of a punitive character to maintain a suit for the recovery of the proceeds, which this Court held was removable by the President, in the exercise of his constitutional power to grant pardons for offenses against the United States.

These remarks indicate the proper distinction between the 12th section of the general Court of Claims Act of 1863, which regulates the ordinary municipal jurisdiction, so to speak, of that Court, and the Captured and Abandoned Property Act, which alone defines and regulates the jurisdiction in cases of captures by military or naval forces on land and on the inland waters, which may be described as the capture jurisdiction of the Court of Claims. (Haycraft's Case, 22 Wall., 98; Lamar *v.* Brown, 92 U. S. R., 195, 198.)

II.

Jurisdiction of the Court of Claims in Cases of Military and Naval Captures.

It is obvious, from the slightest consideration of the nature and character of the jurisdiction exercised by the Court of Claims, in cases arising under the Captured and Abandoned Property Act, that the jurisdiction of the Court, and the rights of claimants, with respect to the proceeds of captured property, depend upon and are governed by the provisions of that statute, and are not defined or regulated, in any particular, by any of the provisions of the general Court of Claims Act.

1. The 7th section of the Act of March 12, 1863, excluded from its provisions "any lawful maritime prize by the naval forces of the United States." This Court held, in *Mrs. Alexander's Case*, (2 Wall., 421,) that private property lawfully captured on land by naval forces was not maritime prize, and that such property was governed by the provisions of the Act.

Those provisions were subsequently extended and applied by the Act of July 2, 1864, section 7, to property captured by naval forces on the inland waters of the United States.

2. The jurisdiction thus conferred upon the Court of Claims has been admirably described by the Chief Justice as analogous to the jurisdiction exercised in cases of capture *jure belli* on the high seas, by the ordinary Courts of Prize. (Lamar *v.* Brown, 92 U. S. R., 195.)

Embracing, as we have seen, not only cases arising from captures by military forces, on land, but also those arising from captures by naval forces, on land, and on the inland waters, it included, it would appear, all cases of the hostile capture of private property, under the authority of the United States, except captures made by naval forces on the high seas.

3. The decision and opinion of this Court in the case of *Lamar* v. *Brown*, (92 U. S. R., 197–8,) throw very important light upon this department of the jurisdiction of the Court of Claims, and place it upon its real foundations in the principles of general law and public jurisprudence.

Its place in the public jurisprudence of the United States, relatively to the captures of which it has cognizance, is the same as that of the Prize Courts of Admiralty in reference to captures *jure belli* on the high seas by naval forces.

Sir R. Phillimore has said that it is a matter of reasonable surprise that the jurisdiction of the Prize Court, as a tribunal constituted to administer international justice, should have been confined to *sea-prize*, and without power of cognizance over *land-booty*, except in cases where the two, owing to the coöperation of the army and fleet, had been blended together. (3 Int. Law, 2d. Ed., 206.) *

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*The curious student of recondite jurisprudence might find in this jurisdiction of the Court of Claims the resurrection of the old and obsolete jurisdiction of the Court of the Constable and Marshal of England, which was exercisable as late as the reign of Henry VII. (See Mr. Knapp's *note*, 2 Knapp's Reports, p. 150.)

It is the glory of this Government that it erected, during the late hostilities, a tribunal to take cognizance of cases of capture of private property on land,—a tribunal which neutral States had a right to suppose would administer, in all cases in which *their* subjects were concerned, "*a consistent law, upon certain and known principles, impartially applied to all States and to their subjects.*"

It is, indeed, to be presumed that Congrees intended, when it conferred this important jurisdiction on the Court of Claims, that the Court should take into view the great principles of the public law applicable to the questions presented for decision, and, wherever the rights of neutral subjects were involved, in the memorable language of Lord Stowell, "administer with indifference that justice which the law of nations holds out, without distinction to independent States, some happening to be neutral and some to be belligerent." (The Maria, 1 Rob., 350.)

4. This Court, in the case of *Lamar* v. *Brown*, applied the doctrine of the English Privy Council in the celebrated case of *Elphinstone* v. *Beedrechund*, (1 Knapp, 360,) that no action can be maintained in a Court of *Municipal* Law against the captor of property on land, as the Courts of England had previously held that no British subject could maintain an action against the captor of maritime property as prize. (Le Caux *v.* Eden, 2 Douglas, 594.)

It was held that the Court of Claims had exclusive jurisdiction of questions touching captures of private property on land, thus further assimilating that Court, in this department of its jurisdiction, to the Prize Courts of England and the United States, which are not simply creations of municipal law, but tribunals constituted by the requirements of international law to administer the public law of nations.

The Chief Justice, in the case of *Lamar* v. *Brown*, well said:

"Acting upon the principle thus recognized in England, the United States delegated to the Court of Claims the

necessary authority for the redress of grievances under such seizures by the military forces. Recourse could be had there by all who had supposed wrongs, if they had been loyal, or, having been disloyal, had been pardoned, and had appeared in time. A direct appeal against the Government, for the conduct of its armies, could be made to a Court specially directed to hear and decide upon all such complaints."

5. The Court of Claims was thus a tribunal before whom the subjects of neutral States were bound to come for the restoration of their captured property, and their Governments were ordinarily, under the general principles of public law, not at liberty to interpose on their behalf until their claims were regularly adjudicated by the appropriate tribunal.

The doctrine of public law, as to maritime captures *jure belli*, may be regarded as applicable to captures on land which may be adjudicated by a proper tribunal of the captors' Government; that doctrine is, that "where the responsibility of the captors ceases, that of the State begins. It is responsible to other States for the acts of the captors under its commission, the moment those acts are confirmed by the definitive sentence of the tribunals which it has appointed to determine the validity of captures in war." (Wheaton, Int. Law., Dana's Ed., p. 484.)

This doctrine is expounded by Rutherford, (Institutes, vol. II, b. 11, ch. 9,) and, upon his grounds, in the great opinion of Mr. Pinkney, as a member of the Joint British and American Commission under the Jay Treaty. (Wheaton's Life of Pinkney, pp. 193, 372.)

Rutherford says:

"The exclusive right of the State to which the captors belong, to adjudicate upon the captures made by them, is founded upon another—that is, its right to inspect into the conduct of the captors, both because they are members of it, and *because it is responsible to all other States for what they do in war;* since what they do in war is done either under its general or its special commission. The right of the State, to which the captors belong, to judge

exclusively, is not a complete jurisdiction. The captors, who are its own members, are bound to submit to its sentence, though this sentence should happen to be erroneous, because it has complete jurisdiction over their persons. But the other parties to the controversy, as they are members of another State, are only bound to submit to its sentence so far as this sentence is agreeable to the law of nations or to particular treaties; because it has no jurisdiction over them, either in respect of their persons, or of the things that are the subject of the controversy. If justice, therefore, is not done to them, they may apply to their own State for a remedy, which may, consistently with the law of nations, give them a remedy, either by solemn war or reprisals. Since it is usual in maritime countries to establish not only superior courts of marine to judge what is and what is not lawful prize, but likewise superior courts of review, to which the parties may appeal if they think themselves aggrieved by the superior courts, the subjects of a neutral State can have no right to apply to their own State for a remedy against an erroneous sentence of an inferior court till they have appealed to the superior court, or to the several superior courts, and till the sentence has been confirmed in all of them. For these courts are so many means appointed by the State, to which the captors belong, to examine into their conduct; and till their conduct has been examined by all these means the State's exclusive right of judging continues. After the sentence of the inferior court has been thus confirmed, the foreign claimants may apply to their own State for a remedy, if they think themselves aggrieved; but the law of nations will not entitle them to a remedy unless they have been actually aggrieved. When the matter is carried thus far, the two States become the parties in the controversy." (Rutherford's Inst., vol. II, b. 11, ch. 9, § 19.)

6. The Court of Claims has, therefore, two departments of jurisdiction, like the Court of Admiralty, with its instance and its prize jurisdictions. One department relates to the subjects of ordinary cognizance in that Court, and is governed by the general statutes applicable to the Court; the other department relates to military and naval captures on land and on inland waters, and is governed by the Captured and Abandoned Property Act, and the principles of general law and public jurisprudence applicable to hostile captures.

III.

The Effect of the Dismissal of the Present Claim.

It is manifest that, although the seizure and sale of the property of Mr. Collie, under the Act of March 12, 1863, did not operate to divest or change the title of the proceeds in the Treasury, the effect of the final dismissal of his present claim, by the decision of this Court, would amount, in its effect upon the claimant, to the same thing as the determinate appropriation of his property by the Government of the United States. Such a decision would determine that the Government of the United States, while subjecting his property to capture and sale, has made no provision for the restoration of what represents it in the public treasury, and that these proceeds have been and are now withheld from him by the United States, specifically in consequence of his transactions during the period of hostilities with the Confederate States. Manifestly, therefore, if the statute of March 12, 1863, precludes the claimant from recovering the proceeds of his property in the Treasury, that statute is *virtually* an act of confiscation in its operation and effect upon this British subject and his property; for, clearly, it cannot matter to an individual, the proceeds of whose property, seized or captured and sold under the authority of the Government, are in the public treasury, whether his title is divested by a formal judicial decree of forfeiture or confiscation, or whether the proceeds are withheld from him by the force and operation of a legislative ordinance, without provision for any remedy for the recovery of the property. In both cases the simple effect is the same—*to appropriate and deprive him of his property;* and that is all there ever is of substance in confiscation.

If Congress, by the Act of March 12, 1863, had made no provision for the restoration of the proceeds of property captured and sold under its authority, the statute would have constituted simply a rule of capture making private property seized on land, in the hostile territory, prize and booty

of war to the United States; and if, by the just construction of the statute, the owner of any property captured and sold under the authority of the statute is *excluded* from the benefit of the remedy provided for the recovery of the proceeds of captured property, the statute operates, as respects him, as, in effect, an expression of the sovereign will of Congress, that his property was and should be treated as the lawful subject of capture as *prize and booty of war*.

The practical question, therefore, now presented in the case of this British subject is, whether the Act of March 12, 1863, is in effect a statute which authorized the capture and appropriation of his property on land, in the Confederate States, as booty of war, on account of his acts in the way of his maritime trade and commerce with that territory during the period of hostilities; or whether the United States have not done what they were bound to do under the public law, namely, placed the non-resident subjects of foreign States affected by the operation of the statute of 1812, in respect to the right to demand and recover the proceeds of their captured property, and in respect to the remedy for the enforcement of that right, upon an equal footing *at least* with the most favored class of citizens of the United States whose private property fell under the operation of the statute?

There is every presumption that Congress never intended to withhold from the subjects of neutral States, domiciled in their own country, the proceeds of property belonging to them in the public treasury, while it provided for the restoration of the property of the inhabitants of the hostile territory captured in the same situation, under like circumstances, and under the authority of the same statute.

IV.

Discrimination against Neutral Subjects Internationally Unlawful.

If the statute of 1863 precludes the claimant, the subject of a neutral State, personally and commercially domiciled in his own country, throughout the hostilities, and who never, there-

fore, was under any obligations of fidelity or obedience to the United States, from recovering the proceeds of this property, while it enabled all citizens of the United States, and aliens domiciled in the United States, under the allegiance of the Government, no matter what acts of treason they committed during the rebellion, to seek and obtain the restoration of the proceeds of all property belonging to *them* in the same predicament as the claimant's property, the statute has discriminated, in a most odious and offensive manner, against the subject of a friendly foreign State, who, upon all principles of public law, was entitled to be placed by the Government at least upon an equal footing of right and remedy with its *rebel enemies*, in respect to property captured, under its authority, in the Confederate States.

1. What the Government has done, in this matter, for the relief of its own citizens, and all who were within its allegiance during the period of the rebellion, will appear by a simple statement of the effect of the Captured and Abandoned Property Act, in connection with the operation of the grants of special and general pardons made by the President during and since the period of the rebellion.

By the operation and effect of the statute, and the pardon and amnesty of the President, all who were within the allegiance of the United States, *enemies*, *rebel* enemies, and traitors, the innocent, as well as the guilty, subjects of the Government, were enabled to recover the proceeds of their property captured during the hostilities.

If the doctrines contended for by the United States, in this case, are sound, the *only* class of persons, affected by the hostilities, in respect of their private property on land in the Confederate territory, who have been deprived by the Government of the right to recover their captured property, consists of the *subjects of neutral States, domiciled under the protection and allegiance of their own Government, who carried on their trade and commerce with the Confederate States under the authority and protection of the law of nations.* The result of this construction of the legislation of the Government would be, that the United

States have undertaken to discriminate in respect to property captured under their authority in the hostile territory, in favor not only of their own *enemies*, but of their own *rebels* and *traitors*, against the *de jure* and *de facto* subjects of friendly foreign States, who owed the United States no duty, and were under obligations of fidelity and allegiance only to their own sovereign.

2. It is simply impossible to believe that any interpretation will be given by the Court to the sovereign acts of the Government in reference to this subject, which will lead to any such consequence, as the necessary and unavoidable effect of those sovereign acts.

If the Government of the United States had the right to take private, neutral-owned property as booty of war, it was bound to avoid all discrimination in favor of the property of its enemies in the same situation.

It could not make booty of war of neutral property, while it exempted enemy property from appropriation as booty, much less could it exempt the property of *rebel* enemies from capture as booty, while it made booty of the property of the subjects of neutral States.

The Court, we think, must conclude, either that the private property of neutrals, in the situation of this claimant, was not *intended* to be embraced by those terms of the Captured and Abandoned Property Act by which the proceeds of the property of *rebel* enemies were withheld, or that, by the operation and effect of the general *amnesty*, proclaimed by the Government on the 25th of December, 1868, the proceeds of the captured property of such persons were restored to them, in the same way, and to the same extent, that the proceeds of similar property of persons guilty of treason to the United States, were restored to them by that act of sovereign grace.

Mr. Collie is to be treated as not embraced by the terms of the act intended to affect those who were guilty of treasonable offences against the United States, and thus placed—as to the right and remedy given by the legislature—upon an equal footing with the inhabitants of the revolted States,

who were *de jure* enemies of the Government; or, if it should be held, that his transactions constituted aid and comfort to the rebellion, in the sense of the statute, and that the statute thus dealt with him as it dealt with the rebels and traitors of the United States, it must be held that he, like them, was restored to all rights of property, by the operation and effect of the amnesty of the Government.

If neither of these views should be accepted, and it should be finally held that the Government has not placed him on the footing either of its enemies or its traitors, but has declared his property subject to be retained in its treasury, and has thus virtually confiscated it to the United States, while it has restored like property of its enemies and traitors, it would be the right of the friendly foreign State whose subject has been thus dealt with, to inquire as to the conformity of such action with the international duty of the Government.

A foreign State would never inquire by what particular exercises of the sovereign power of the Government, under its municipal constitution, the rebels and traitors of the United States came to be restored to their rights with respect to their captured property, and how it happened that the subjects of the foreign State came to be "*ground between the upper and the nether millstone.*" It would look only to the fact that, by the operation of this statute, in connection with the amnesty of the President, the Government had restored the property of its own guilty citizens, while it had been finally declared, by the highest judicial authority of the United States, that the Government had virtually confiscated the property of the subjects of the foreign State, captured under like circumstances, for acts which it could take no cognizance of as offenses against the sovereignty or laws of the United States.

3. In order that the action of the Government of the United States in reference to this subject shall conform to the requirements of international law, it must be declared by this Court, either that the claimant's acts were not such acts

as constituted aid or comfort to the rebellion, in the sense of this statute, or that the consequences annexed to those acts, if they were aid or comfort, in the sense of the statute, have been removed by the pardon and amnesty of the Executive.

In Carlisle's case (16 Wall., 153) this Court say: "It is not to be supposed that Congress intended by the general language of the act to encroach upon any of the prerogatives of the President, and especially that benign prerogative of mercy which lies in the pardoning power. It is more reasonable to conclude that claimants restored to their right of property by the pardon of the President, were not in *contemplation* of Congress in passing the act, and were not intended to be embraced by the requirements in question. All general terms in statutes should be *limited in their application*, so as not to lead to *injustice*, *oppression*, or an *unconstitutional operation*, if that be possible. It will be presumed that *exceptions* were intended which would avoid results of that nature." (United States *v.* Kirby, 7 Wall., 482.)

It is equally true, as this Court has so often said, that all general terms in statutes should be so limited in their application as not to violate the *law of nations*, or lead to any breach or failure of international duty, on the part of the United States, to any foreign State; and the terms of the act of 1863, therefore, should be so construed as not to lead to any discrimination against the subjects of foreign nations, in respect to property which the operations of war brought under the control of the United States.

It is not to be supposed that Congress intended to violate the law of nations, by appropriating as booty of war the private property of the subjects of neutral States, and, at the same time, releasing like property of enemies and rebels of the United States in the civil war; and we submit the act cannot be construed so as to have that effect without doing violence not only to its spirit, but also to its letter.

V.

The Canons of Construction.

The cardinal rule which is to govern the construction of this act of Congress, for the purposes of the present case, is the rule expounded and enforced by this Court, in the early case of *Murray* v. *Charming Betsy*, (2 Cranch, 118,) namely, "that an act of Congress ought *never* to be construed to violate the law of nations, if any other *possible* construction remains, and, consequently, can never be construed to violate *neutral rights*, or to affect *neutral commerce*, further than is warranted by the law of nations, as understood in this country."

1. The principle is a part of the great general doctrine of construction declared by Chief Justice Marshall, in *The United States* v. *Fisher*: (2 Cranch, 300:)

"Where rights are infringed; where fundamental principles are overthrown; where the general system of the laws is departed from, the legislative intention must be expressed with *irresistible clearness*, to induce a Court of justice to suppose a design to effect such objects."

The principle has been applied by this Court, whenever called upon to consider and adjudge the rights of the subjects of neutral States, under the regulations of the Government of the United States. In the case of *Talbot v. Seaman*, (1 Cranch, 43,) where the question was, whether salvage was demandable, under the act of March 2, 1799, from recaptured neutral property, Chief Justice Marshall said the words of the act would certainly admit of this construction, but, he declared, "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law."

The full scope and effect of this great rule of construction will be best appreciated by observing the application which was made of it in the case of *The Charming Betsy*, (2 Cranch,

641,) where the question arose whether a vessel and cargo, belonging to a citizen of the United States, who was domiciled in a foreign country, was liable to forfeiture, under the act of February 27, 1800, suspending intercourse with France. That act subjected to forfeiture any vessel owned by any person, resident within the United States, or any *citizen* of the United States, resident elsewhere, engaged in carrying on trade and commerce with French territory. The question was, whether the owner of *The Charming Betsy*, who, although a citizen of the United States, resident out of the United States, was subject to the protection of the Danish Government, could be deemed included within the prohibition of the statute. The Court held that an intention to affect a person in the situation of the owner of that vessel, with a disability to hold commercial intercourse with France, would place the act in conflict with the general public law as to the rights of neutral commerce; and the owner was accordingly declared exempt from its operation. The great Chief Justice said it was the duty of the Court, in giving construction to an act, to keep in view the principle that "an act of Congress ought *never* to be construed to violate the law of nations, if any other *possible* construction remains."

Mr. Bishop lays down this fundamental rule of construction thus: "To the law of nations every Government is bound to conform; and every *municipal statute* must be construed as being subject to the *exceptions* required by this law." (1 Criminal Law, sec. 92.)

Mr. Maxwell, in his recent work on the construction of statutes, states the doctrine thus:

"Every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the *established rules of international law.* If, therefore, it designs to effectuate any such object, it must express its intention with irresistible clearness, to induce a Court to believe that it entertained it; for as long as any other *possible* construction remains, it would be adopted, in order to avoid imputing such an intention to the Legislature. *All general terms must be narrowed in construction to avoid it.*" (Maxwell on Statutes, p. 122.)

This doctrine was recognized as one of paramount force in the interpretation of acts of municipal legislation by all the Judges of England, in the great case of *The Queen* v. *Keyn*, (Law Rep., 2 Ex. Div., 63,) where the question was as to the jurisdiction of the British Criminal Court to try offenses by foreigners on board foreign ships within three miles from the shore of England.

Sir R. Phillimore, in that case, speaking of the Merchant Shipping Act of 18 and 19 Vict., sec. 31, said (p. 85): "The foreign ship is not mentioned in this section, which is, therefore, applicable only to British ships, because *it is an established principle, as to the construction of a statute, that it should be construed, if the words will permit, so as to be in accordance with the principles of international law.*"

Lord Chief Justice Cockburn said (p. 210): "Before we can hold the statute, (of 28 Henry, 8, c. 15,) from the generality of its terms, to include foreigners, we have to consider whether, according to the *law of nations*, the jurisdiction of the Admiral over foreigners in foreign ships existed when the statute was passed. For where the language of a statute is *general*, and may include foreigners or not, the true *canon of construction is to assume that the Legislature has not so enacted as to violate the rights of other nations.*"

Dr. Lushington, in the case of *The Annapolis*, (2 Lush. Adm., 295,) discussed the question whether the Court of Admiralty in its *instance* jurisdiction would be bound to obey an act of Parliament, in violation of the principles of public law; but, whether or not so bound, he said: "In cases admitting of doubt, the *presumption would be that Parliament intended to legislate without violating any rule of international law, and the construction has been accordingly.*"

Lord Stowell, in the case of *The Nostra Signora de los Dolores*, (1 Dod., 290,) said:

"*This is a question of the law of nations; and the party complainant, being a foreigner, comes to a Court which has to administer that law.* I do not recognize the applicability of those cases which have been determined between *British* subjects

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to such a case as this, which is founded on the law of nations, is brought on the complaint of a person not subject to our laws, and is to be tried in a Court whose duty it is to administer the law of nations."

This Court, in the early *Piracy Cases*, said that "general words must not only be limited to cases within the *jurisdiction* of the State, but also to those objects to which the Legislature intended to apply them." (U. S. *v.* Palmer, 3 Wh., 631; U. S. *v.* Willburger, 5 Wh., 97.)

It was accordingly decided that robbery committed on the high seas by a person who is not a citizen of the United States, on board of a foreign ship, is not piracy, under the act of 1790, and not punishable in the Courts of the United States, although the words of the act are in terms of unlimited extent, and broad enough to cover every human being.

In the celebrated case of *Le Louis*, (2 Dod., 239,) where the application of the British Slave Trade Act to a French ship came in question, Lord Stowell said:

"Neither the British Act of Parliament nor any commission founded on it can affect any right or interest of foreigners, unless they are founded on principles and impose regulations that are consistent with the law of nations. *This is the only law Great Britain can apply to them; and the generality of any terms employed in an Act of Parliament must be narrowed in construction by a religious adherence thereto.*"

This principle was acted on by Vice-Chancellor Wood, and the Lords Justices, on appeal, in the case of *Cope* v. *Doherty*, (1 K. & J., 367; 2 De G. & J., 614,) where the owners of one foreign ship, having sued another for damages done by a collision at sea, on the defendants seeking to obtain advantage of the limitation of liability established by the Merchants Shipping Act, it was held that, however *general* in its terms, the enactment did not apply to foreign vessels. Lord Justice Turner said: "This is a British Act of Parliament, and it is not, I think, to be *presumed* that the British Parliament could *intend* to legislate as to the rights and liabilities of foreigners. In order to warrant such

a conclusion, either the words of the act ought to be express or the context of it very clear."

2. This Court has frequently declared that general words in a statute should be so limited in their application as not to lead to consequences which it is presumable the Legislature did not intend when the statute was enacted.

Mr. Justice Field laid down the rule in *The United States* v. *Kirby:* (7 Wall., 486 :)

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It is always to be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

"The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks person shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."

In *Carlisle* v. *The United States,* (16 Wall., 153,) the same Justice said, that all general terms in statutes should be so limited in their application as not to lead to any *unconstitutional* operation, and, therefore, that it was not to be supposed that Congress intended by the Act of March 12, 1863, to impose upon claimants pardoned by the President any disability to recover the proceeds of captured property.

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other rules of construction, which are to be borne in mind in the interpretation of this Act of March 12, 1863:

"The first and most important rule of construction is, that it is to be assumed, in the first instance, that the words and phrases are used in their technical meaning, if they have acquired one, and in their popular meaning, if they have not." (Page 2.)

"In interpreting a statute, it is to be borne in mind that language is always used *secundum subjectam materiam*, and that it must, therefore, be understood in the sense which best harmonizes with the subject-matter." (P. 50.)

"It is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject-matter in reference to which the words are used, finds its most frequent application. It is, therefore, a canon of interpretation that all words, if they be general, and not expressed and precise, are to be restricted to the fitness of the matter. They are to be construed as particular, if the intention be particular—that is, they must be understood as used in reference to the subject-matter in the mind of the Legislature, and to it only." (P. 54.)

"Before adopting any proposed construction of a passage susceptible of more than one meaning, it is necessary to consider the effects or consequences which would result from it; for they do very often point out the genuine meaning of the words." (P. 65.)

"The widest operation may be given to a *remedial* statute which the language admits, where the general object is more completely served by it." (P. 88.)

VI.

Private Property on Land, not Booty of War, under Modern Public Law.

The act of March 12, 1863, should be construed so as to be in harmony and accord with the modern public law of civilized nations, which discountenances and condemns the general seizure and appropriation of private property on land, in the enemy's territory, as *booty of war*, or for the sake of gain, and which tolerates belligerent interference with such property only in special cases, dictated by the necessary operations of war, and in those cases only in the

manner, and to the extent, necessary for the purposes of those operations.

The act of Congress under consideration must be construed by a *religious adherence* to these principles of the modern public law; and it must be presumed that Congress intended to authorize the restoration of the proceeds of all private property captured on land, which cannot be appropriated for the purpose of gain by any belligerent State, says Chancellor Kent, without meeting with indignant resentment, and the general scorn and detestation of the world.

1. Professor Sir Edward Creasy, after stating the old rule, by which movable property of enemies found in the enemy's territory is booty (*butin*) of war, says: "The modern usage as to private movable property is for the occupying belligerent not to appropriate it, and not to destry or damage it, without compensation, except for purposes of military necessity. Every harm to person or property is internationally unlawful, which is done out of mere wantonness, or cruelty, or vindictiveness, or which, although it may conduce to one of the true and lawful purposes of the war, does so *indirectly* and *unsubstantially*." (First Platform of International Law, pp. 518, 519.)

Sir Travers Twiss says:

"It is now the practice among Christian nations for the sovereign power not to seize and confiscate, as booty of war, the private property of individual citizens, but either to content itself with making prize of all the public property of the enemy nation which is of a movable character; or, in case it should assert its right of conquest over the private property of enemy-citizens, to limit itself to levying upon them a contribution of money or provisions, in consideration for which their actual property is guaranteed from pillage.

"All damage which is done to an enemy, without any corresponding advantage accruing to the belligerent, is an abuse of the national right of the other." (Law of Nations: War, secs. 64–65.)

Dr. Phillimore lays down the same principle, and declares

that the modern rules of warfare allow no injury to the subjects of the enemy, or of neutral States, which does not *clearly* and *certainly* tend to promote the objects of the war. (3 Int. Law, 2 ed., p. 78.)

Our own American authorities fully sustain the doctrines of the English publicists.

Chancellor Kent (1 Comm., 92) says:

"There is a marked difference in the right of war carried on by land and at sea. The object of a maritime war is the destruction of the enemy's commerce and navigation, in order to weaken and destroy the foundations of his naval power. The capture or destruction of private property is essential to that end, and it is allowed in maritime wars by the laws and practice of nations. But there are great limitations imposed upon the operations of war by land; though depredations on private property, and despoiling and plundering the enemy's territory, are still too prevalent, especially when the war is assisted by irregulars. The general usage now is, not to touch private property upon land without making compensation, unless in special cases, dictated by the necessary operations of war, or when captured in places carried by storm, and which repelled all the overtures for a capitulation. Contributions are sometimes levied upon a conquered country in lieu of confiscation of property, and as as some indemnity for the expenses of maintaining order and affording protection.

"If the conqueror goes beyond these limits wantonly, or when it is not clearly indispensable to the just purposes of war, and *seizes private property of pacific persons for the sake of gain*, and destroys private dwellings, or public edifices devoted to civil purposes only, or makes war upon monuments of art and models of taste, he *violates the modern usages of war, and is sure to meet with indignant resentment, and to be held up to the general scorn and detestation of the world.*"

See General Halleck's Chapter on "*Enemy's Property on Land*," (p. 450, sec. 12,) also Mr. Wheaton's statement of the present law of nations, (Wheaton, Lawrence's edition, p. 596,) and Mr. Dana's *note* on the *Distinction between Enemy's Property at Sea and on Land* (Dana's Wheaton, p. 451.)

Dr. Francis Lieber's "*Instructions for the Armies of the United States in the Field*," approved by Mr. Stanton and President Lincoln, have attracted the attention and admiration of such men as M. Bluntschli (*Le Droit Inter Codifié*) and the Belgian jurist M. Laveleye (*Du Respect de la Propriété Privee in temps de guerre*).

The maxim of the "Instructions" is, that "the United States recognizes and protects private property in enemies' territory."

Dr. Woolsey cites, with approbation, the following remarkable passage from the celebrated address of M. Portalis, at the installation of the Council of Prizes, which he borrows from Heffter, sec. 119:

"The right of war is founded on this: that a people, in the interests of self-conservation, or the sake of self-defense, will, can, or ought to use force against another people. *It is the relation of things, and not of persons, which constitutes war; it is the relation of State to State, and not of individual to individual.*"

Dr. Woolsey says the modern rules of war are these:

1. The property, movable as well as immovable, of private persons in an invaded country is to remain uninjured.

2. Contributions or requisitions are still permissible; but they are demoralizing, and defeat their own ends.

3. The only true and humane principle is, that war is waged by State against State, by soldier against soldier.

Dr. Bluntschli, in his *Le Droit International Codifié*, says:

"The conqueror is bound to respect private property, and can only seize or destroy it when military operations demand such a course." (Sec. 652.) "The laws of war especially do not authorize requisitions purely pecuniary." (Sec. 654.) "Persons who form part of an army have not the right to seize objects belonging to private individuals, or to injure such objects voluntarily. But, in case of absolute necessity, provisions or clothing may be appropriated. The public treasury (*le fisc*) will nevertheless be bound to reimburse the value of the articles taken, unless the inhabitants were under an obligation to furnish them gratuitously." (Sec. 656.)

"*The international law absolutely interdicts the acquisition of booty in time of war.*" (Sec. 657.)

The whole subject of the *status* of private enemy's property, at sea and on land, during war, has been treated by that distinguished French jurist, M. Ortolan, with a philosophic and practical spirit that places him at the head of the publicists who have discussed this subject. (Diplomatie de la Mer, liv. iii, ch. 2.)

He defends the belligerent right of capture of private enemy property at sea, upon grounds which establish the rule of the absolute exemption of such property on land, in territory under military occupation of a conquering belligerent, from lawful capture and appropriation as prize and booty of war. He says:

"The capture of a ship and cargo is not like the confiscation of a warehouse of goods; for the ship and seamen are potentially an auxiliary of the naval forces of the nation, and constitute a means of extending its power beyond its proper territory. Since a belligerent cannot take possession of the sea and hold it *as a territory*, he can only take the ships he finds there; and, as by *occupying territory*, he may interfere with the territorial power of his enemy, so, at sea, by capturing ships, he may interpose against his enemy's right of passage."

M. Ortolan, while contending for the rule of the right to capture and confiscate private enemy property at sea, still advocates a partial protection of private rights, by the *restoration of the value of the goods*, in specified cases, to be made either immediately, or at the termination of the war.

The reasoning of M. Ortolan is exceedingly satisfactory. The belligerent has no just right to capture and appropriate to his own use private property on land, within the territory in his military occupation, because he is in the control of the territory, and can prevent the property from being made contributory to the wealth and strength of the hostile Government; it is not the subject of taxation, contribution, or confiscation by that Government.

The only object a belligerent can have in capturing, as

prize or booty of war, the private property in territory under his control, is to *enrich* himself; which, Mr. Dana well says, is not a justifiable object in making war, nor a justifiable object in concluding peace. (Wheaton, p. 450.)

If a belligerent should deem it necessary or expedient, with reference to the future consequences of war, to capture and remove private property from the territory of his enemy, under his military control, the modern principles of civilized warfare require that proper provision shall be made for the actual or potential restitution of the property, after pacification, to its owners, and that it should not be appropriated to the use of the State for the purpose of enriching its public treasury.

The Court will not fail to observe that the question of the just international right of a belligerent to destroy private property found in the enemy's territory, where such destruction is necessary to facilitate the operations of the war, or to insure success, or to seize it by way of requisitions, to the extent to which such requisitions are necessary for the support of a belligerent army, or to levy upon it *bona-fide* contributions, is a very different one from the question of the just right of a belligerent State to capture and appropriate such property as prize and booty of war.

VII.

The Act of March 12, 1863, a Remedial Statute.

This Court has conclusively and repeatedly adjudged that nothing in the Captured and Abandoned Property Act was intended by Congress to violate the principles and usages of modern civilized warfare, in regard to private property found upon the enemy's territory; that Congress recognized in that legislation, to the fullest extent, the rightful exemption of all such property, in the hostile territory, from capture and appropriation as prize and booty of war; that Congress authorized the capture of private property

not for *booty*, but to *cripple the enemy*, and provided for its *preservation*, and *not* its *appropriation;* that the title of the owner was in no case divested under the Act by the seizure or capture of any private property by military authority; that it was the definite purpose of Congress that the "proceeds" of all property for which the special provision of the Act was made, should go into the Treasury *without any change of ownership;* that the "proceeds" of *all* private property, captured during the war, should be held by the United States in *trust* for its former owners; and, further, that the Captured and Abandoned Property Act was a *remedial* statute, requiring such a *liberal* construction as will give effect to the *beneficent intention* of Congress.

The legal *presumption*, therefore, is that Congress did not *intend* to withhold from any owner, claiming within the time limited by the statute, the right to recover the proceeds of his captured property in the Treasury; and that presumption must prevail, in every case, unless the Court is able to discover that Congress has expressed its intention with *irresistible clearness* to withhold from the claimant the benefits intended to be given by the statute.

The statute being a remedial statute, the most enlarged construction and the widest operation must be given to it which the language admits, so as more effectually to meet the beneficial and beneficent end which Congress had in view.

1. While doubtless it was lawful for the United States, under the general public law, to seize such an article as cotton wherever found in the hostile country, for the purpose of removing it from the control of the hostile organization, or, possibly, to destroy it, if military necessity absolutely required its destruction, the United States could not have declared all cotton, wherever found, in the hands and ownership of private persons, whether citizens, or inhabitants, or non-resident aliens, the general subject of prize and booty of war to the Government, without flagrant and barbarous violation of the most sacred precepts of interna-

tional law, and shocking the common conscience of mankind; and, in the case of the citizens or subjects of foreign States, without entitling them, upon the intervention of their Governments, to adequate indemnification for any loss or injury they might sustain in consequence of the execution of such a policy of uncivilized and unchristian warfare.

It is a subject of congratulation, to all who have the international honor of the Government at heart, that Congress, as the sovereign authority of the United States, never intended that the Government should enter upon any such career of national spoliation and robbery.

The Captured and Abandoned Property Act regulates the whole subject of the capture of private property on land under military authority, and defines all the rights claimed and intended to be asserted by the United States, with respect to private property on land which might be made the subject of such capture.

That Act defines absolutely, for all departments of the Government, the *status* of all private property which may have fallen under its operation, and no such private property became, by capture, prize and booty of war. No confiscation was intended, and in no case was the property of the original owner, though a rebel and a traitor, divested by the seizure.

2. The legislation in the Act of March 12, 1863, can be reconciled with the public law, in the case of citizens or aliens, only in the view presented and applied in all the decisions of this Court: that Congress intended to substitute the "proceeds" in place of the "property," and to transfer, in every case of capture, the proprietary right and interest of the owner from the "property" to the "proceeds."

By this method, while the title of the *res* was changed by sale, the proprietary interest of the original owner was preserved, by being applied to and vested in that which represents it in the custody of the United States. The Court but

gave precise interpretation and effect to the language of the Act when it said, that "*the title to the 'proceeds' of the property which came to the possession of the Government by capture, was in no case divested out of the original owner;*" and that it was "*the purpose of Congress that the 'proceeds' of the property should go into the Treasury without any change of ownership.*"

While authorizing the capture and sale, and the payment of the "proceeds" into the Treasury, Congress, in the same breath, so to speak, authorized those who claimed the "ownership" of the property to demand and recover those "proceeds" upon making the requisite proof in the Court of Claims.

The right being thus given expressly and distinctly to the "proceeds," demonstrates the intention of Congress not to affect the proceeds by any appropriation or confiscation to the public use, but to preserve them in trust for the use and benefit of the owner of the property. The "proceeds," and not the "value," of the property, are the subject of claim, under the authority of the United States, in the Court of Claims; which shows that the title to the "proceeds" was never intended to be divested out of the original owner of the property, who is expressly invited by the statute to claim them in the appointed tribunal.

3. The decisions of this Court, from first to last, declare one uniform doctrine in regard to the *status* of all private movable property, captured on land by our military forces, during the period of hostilities, under the authority or sanction of the Act of March 12, 1863.

In Mrs. Alexander's Case, (2 Wall., 420,) the consideration that it was not the policy or purpose of Congress, as expressed by that Act, to subject the private property of enemies found on land to confiscation, induced this Court to withdraw all property lawfully captured on land by naval forces from the jurisdiction of the Prize Courts, and place it under the jurisdiction of the Court of Claims, where no condemnation could be enforced. It is most explicitly de-

clared, in that case, that the only legitimate object of the capture of cotton belonging to private owners was to prevent it from being used by the hostile organization as the basis of financial credit. The idea that it was the lawful subject of capture as *booty*, "for the sake of gain," is carefully repudiated as unwarranted by the public law, as well as by the statute.

The Chief Justice said:

"The rebels regarded it as one of the main sinews of war, and no principles of equity or just policy required, *when the national occupation itself was precarious*, that it should be spared from capture, and *allowed to remain, in case of the withdrawal of the Union troops*, an element of strength to the rebels."

In *Anderson's* Case, (9 Wall., 64,) this Court declared that the Government assumed the obligations of a trustee, with respect to private property captured on land, and that the Act was subject to the most liberal interpretation in favor of the right of owners to recover the proceeds of such property.

The Attorney-General, under whose Opinion of July 5, 1865, the cotton captured at Savannah was turned over to the Court of Claims, had declared, before any judicial construction of the Act of 1863, the same doctrine of *trust*, as applied to the relations of the Government to that property. (9 Opinions, 278.)

In *Padleford's* Case, (9 Wall., 538,) the Court said:

"In the several cases decided this term, and especially in the case of *United States* v. *Anderson*, the Act has been held to be *remedial* in its nature, requiring such a *liberal construction as will* give effect *to the beneficent intention of Congress*. The intention was that *all property captured or found abandoned during the war*, after the date of the law, should be turned into money, and that the proceeds should be placed in the Treasury, subject to the right of *any* person preferring a claim against any portion of the property to have the net proceeds restored to him, &c.

"Under the proclamation and the Act, the Government is a trustee, holding the proceeds of the petitioner's prop-

erty for his benefit; and, having been fully reimbursed for all expenses incurred in that character, *loses nothing by the judgment which simply awards to the petitioner what is his own.*''

In *Klein's* Case, (13 Wall., 136,) the Court say:

"It may be said, in general terms, that property in the insurgent States may be distributed into four classes—1. That which belonged to the hostile organization, or was employed in actual hostilities on land; 2. That which at sea became lawful subject of capture and prize; 3. That which became the subject of confiscation; 4. *A peculiar description, known only in the recent war, called captured and abandoned property.*

"Except to property used in actual hostilities, as mentioned in the 1st section of the Act of March 12, 1863, *no titles were divested in the insurgent States unless in pursuance of a judgment rendered after due legal proceedings.* The Government recognized, to the FULLEST EXTENT, *the humane maxims of the modern law of nations, which exempt private property of non-combatant enemies from capture as booty of war.*

"The spirit which animated the Government received special illustration from the Act under which the present case arose. We have called the property taken into the custody of public officers under that Act, a *peculiar species*, and it was so. *There is, so far as we know, no similar legislation mentioned in history.*

"That it was *not* the intention of Congress that the title to the proceeds should be *divested* absolutely out of the original owners of the property, seems to be clear, upon a comparison of different parts of the Act. It is reasonable to infer that it was the purpose of Congress that the *proceeds of the property for which the special provision of the Act was made, should go into the Treasury without change of ownership.* Certainly such was the intention in respect to the property of loyal men. That the same intention prevailed in regard to the property of owners who, though then hostile, might subsequently become loyal, appears probable from the circumstance that no provision is anywhere made for confiscation of it; while there is no trace in the statute-book of intention to *divest ownership of private property not excepted from the effect of the Act, otherwise than by proceedings for confiscation.*

"In the case of *Padleford*, we held that the right to the *possession* of private property was not changed until actual

seizure by proper military authority, and that *actual seizure by such authority did not divest the title under the provisions of the Captured and Abandoned Property Act.*

"*We conclude, therefore, that the title to the proceeds of property which came to the possession of the Government by capture or abandonment, with the exceptions already noticed, was in* NO CASE *divested out of the original owner.*"

In *Haycraft's* Case, (22 Wall., 93,) the present Chief Justice, even more clearly, shows that it was not the purpose of Congress, in making this rule of capture, that the Government of the United States should acquire by capture any title to private property on land as prize and booty of war, but, on the contrary, that Congress intended that no such title or interest should be acquired in any such captured property.

The Chief Justice says:

"Such was the power to take, given by the Act, and such the obligation assumed upon the taking, with the remedy provided for its enforcement. It was evidently a war measure, and the statute is to be construed in the light of that fact. It was confined to private property of the enemy. Public property was expressly excluded. It embraced no private property except such as was abandoned by its owners or liable to capture. The property in this case was cotton, and, according to the uniform decisions of this Court, the subject of capture. As was said in Mrs. Alexander's Case, cotton was regarded by the insurgent Government as one of its 'main sinews of war.' It was, in fact, the foundation upon which the financial system of the rebellion was built. It was a security the insurgents offered for the payment of their debts. Upon it they relied for their influence abroad. To obtain it, forced contributions were exacted from its owners. From time to time it was found upon the enemy's territory occupied by the military forces of the United States. While, when so found, it might have been owned by non-combatant enemies, and, in that sense, private property, it was, in fact, under the circumstances, at least semi-public. If left undisturbed, and the insurgents should repossess themselves of the territory, it would again be placed where it might strengthen the rebellion. Its capture was, therefore, legitimate; *not for booty*, but to *cripple the enemy*. In that way it was kept out of the in-

surgent treasury. It might have been destroyed, but the unnecessary destruction of property ought always to be discouraged. *The Act of Congress looked to its preservation, but authorized its capture.* In so doing, Congress acted within its constitutional power to 'make regulations concerning captures on land and water.'"

2. It follows, from these adjudications, that the United States have not, and never had, any proprietary interest whatever in the proceeds of this property in the public treasury, and now hold, and have ever held, the same in *trust* for Alexander Collie, whose right and title to those proceeds have never been transferred to the United States, or divested out of him, by the act, or intention, of the sovereign legislative, or any other, authority of the Government. It was not captured for booty, but to cripple the enemy; and the statute under which it was seized looked to and provided for its preservation; and every purpose of the Act was subserved when it was withdrawn from the hostile territory. It was not only not confiscated in fact to the United States, but there never was any statute which rendered it confiscable, or under which the Government could have divested, and transferred to itself, the title of Mr. Collie by due legal proceedings in any judicial court of the United States; for even the counsel for the Government, in this case, will not claim that either under the Act of July 13, 1861, or the Act of August 6, 1861, or the Act of July 17, 1862, proceedings for condemnation could ever have been, or can now be, maintained against this property.

Instead of providing for proceedings to confiscate the proceeds of the private property which fell under the operation of the Act, after they reached the Treasury, Congress provided a judicial tribunal to adjudicate the claims of the owners, and expressly conferred upon certain persons a right to recover the proceeds of their captured property, by the decree of that tribunal. As to other persons, the Act affected them with a mere *disability,* consequent upon their unlawful acts of "aid or comfort," which was removable, and was removed by the pardon of the President; and,

under and by virtue of the Act of 1863, all persons subject to the United States during the war, who claimed in time, were enabled to obtain actual restitution of the proceeds of their captured property.

If the present claim shall be dismissed, the Government will acquire no better right or greater interest in these proceeds than it now possesses, and they will be, and remain thereafter, as now, the property of the claimant, under the Act of 1863.

3. Such being the *status* of this property and these proceeds, under the only law which ever affected them, according to the solemn decisions of this Court, every intendment should be made in favor of that construction of the words of the Act of 1863, upon which the question of the remedy in this case turns, which would confer upon the claimant the benefits intended to be given by the statute, and enable the Court to award to him what is *his own* under the public law of nations and the law of the United States.

Unless this Court is able to discover some theory upon which the United States can properly retain in their Treasury the proceeds of property in which they have no proprietary or beneficial interest whatever, and which, by their own legislation, are a trust fund belonging to this neutral owner, it is impossible to see how any construction can be placed on the Act of 1863, which will deprive him of the right to recover the proceeds now claimed.

VIII.

The Captured Property *De Jure* and *De Facto* Neutral Property.

The learned counsel who represented the Government in the Court below, advanced, in his printed and oral argument, in that Court, some strange propositions of public law in regard to the international character of Mr. Collie, and the international character of the cotton whose proceeds are the subject of the present claim, which were, prob-

bly, put forward as the result of a very imperfect examination of certain well-known prize cases, to which the able counsel referred as supposed authority for those propositions.

We are not aware how far the same views will be presented in the argument for the Government in this Court, but if they should be advanced here, a few words only will be necessary in reply.

1. By an ingenious misuse of certain familiar doctrines of the law of maritime capture and prize, some of which are generally accepted by publicists, as in conformity with the law of nations, while others have been, for more than a century, the subject of great, and even violent, dispute among jurists, as well as statesmen, in England and America, the learned counsel constructed an argument to show that Mr. Collie, during the late hostilities, was not a *neutral*, but an enemy, as that term is understood in the law of war; if not absolutely, at least *sub modo*, or *pro hac vice*, relatively to the property now in controversy; and that the United States had the right to deal with it, and treat it, as the property of an "enemy," as the phrase is understood in the law of maritime prize.

It must be observed, however, by every one who pays attention to the subjects involved in this inquiry, that if this view were ever so correct, it would not help in any way the case of the Government, in the Court of Claims, under the Act of March 12, 1863. The fact of "*enemy's property*" amounts to nothing, and is not an element, in the adjudication of *any* claim by that tribunal under that Act.

All the property, movable and immovable, wherever situated, or wherever found, at sea or on land, of the entire body of the *domiciled inhabitants* of the Confederate States, and every person among them, was "enemy's property," and the lawful subject of confiscation under the public law of war. But what of that? As to enemy's property on *land*, Congress was alone competent to determine whether confiscation should be enforced against any of it, and how

it should be enforced, if at all. (Brown *v.* United States, 8 Cranch, 126.) And, by the Act of 1863, Congress determined, as to the property on *land*, for which it made special provision, that it should *not* be confiscated, and that *capture should not be confiscation.*

The Act of 1863 restored the proceeds of all property captured on land, and the inland waters, belonging to all residents of the Confederate States, and, therefore, to all *enemies* of the United States, who gave no "aid or comfort" to the rebellion. The question, under that Act, in the Court of Claims, is, not whether the owner was an enemy, or whether his property, when captured, was "enemy's property," in the technical sense of the prize Courts, but, whether or not he gave "aid or comfort" to the rebellion. It boots nothing to prove, ever so satisfactorily, that the property, if it had been captured at sea, would have been confiscable, under the general public law, in the prize Courts of the United States. Nearly the whole of the cotton restored by decrees of the Court of Claims, would have been confiscable to the United States, in the prize Courts, under the public law, if it had been captured at sea; but that fact, of course, did not interfere with the right of the claimants to restitution under the Act of 1863.

2. But there can be no ground for the contention that Mr. Collie was an enemy, or that the property now in controversy was "enemy's property," in any sense known to the public law of war. He was a neutral, and this property was, *de jure* and *de facto*, *neutral property*, in the absolute sense of the law of nations; and if the cotton had been captured on the high seas, the United States, independently of breach of blockade, could not have maintained any proceeding for its condemnation as lawful prize in any Court of the law of nations. No publicist would venture to maintain, seriously, in any Court familiar with the principles of prize jurisprudence, that this cotton could be treated, in any court of the law of nations, as enemy's property, under the prize law of Great Britain or the United States.

The inquiry whether any subject of belligerent capture is *enemy's property*, is always, in technical form, the question of *confiscability* in a prize Court, which is a Court of the law of nations constituted to determine suits arising from hostile maritime captures.

We affirm, as the result of some acquaintance with the reported adjudications of the English and other European and American Courts of Prize, that under no system of prize law in the civilized world, could this cotton, if captured at sea, independently of the question of blockade, have been condemned as the property of an enemy of the United States.

3. The English and American prize cases cited in the argument below, have no bearing upon the case of this property. They were all cases of property affected by juridical relations of the owner to the hostile territory, which never had any existence in the history of Mr. Collie and his maritime commerce with the Confederate States; or cases of property involved in commerce embraced by the principles of what is known to prize lawyers as the "*rule of the war of* 1756," a doctrine which has always been contested by American statesmen as without foundation in the law of nations. (See Mr. Madison's celebrated "Examination of the Bristish doctrine which subjects to capture a neutral trade not open in time of peace," and Judge Story's note on this subject, Wheaton's Rep., vol. 1, App., note 111.)

It would waste space and time to review the cases of *The Vrow Catharina*, (4 Rob., 107,) *The Rendsborg* (Ib., 121,) and others of the same class, which were all cases of the colonial, or coasting, or other privileged trade of the enemy, and the doctrines of which have never been extended beyond the peculiar facts upon which they were adjudged.

Mr. Collie never had a house of trade, or a commercial establishment, in the enemy's country, or a permanent commercial agent there to carry on a privileged trade of the enemy, and his property here involved would not have

been affected by the principles applicable to that class of prize cases if it had been captured at sea.

The proposition that he had no right to send out an agent to make purchases of cotton for him in the Confederate States is simply untenable.

He had as much right to trade with (and buy cotton, or any other property, in) the Confederate States, in person or through an agent, as any citizen of the United States has now the right to trade with and purchase property in Great Britain. And he had the same right to purchase his cotton from the Confederate Government itself as from any inhabitant of the Confederacy.

The cases of *The Phœnix* (5 Rob., 21) and *Bentzon* v. *Boyle*, (9 Cranch, 191,) which define the character of the produce of an enemy's territory, *belonging to the owner of the soil*, whatever may be his national character in other respects, have as little bearing upon the question of the national character of this property as the cases decided upon the doctrines of the "Rule of '56."

Mr. Collie never owned a foot of the soil on which this cotton was grown. He never had a counting-house out of Manchester and London.

4. The discovery of the learned counsel, that *cotton* was property of such a hostile nature that it impressed a belligerent character on, and made an enemy of, every neutral subject who owned a bale of it, deserves, certainly, the praise of novelty, if not of usefulness and juridical soundness.

One would suppose, from the able counsel's brief, that Mr. Collie enjoyed the monopoly of purchasing all the cotton in the Confederate States, and that nobody else had the right to buy and sell a pound of that article in that territory.

The learned counsel's argument in regard to the national character of this cotton, would seem to be that Mr. Collie was first made an enemy by becoming the owner of cotton, and then his cotton became "enemy's *property*," by virtue of his ownership of the property.

"Cotton was King," but it had no power conferred by the consent of nations within the pale of the public law, to convert the subject of a neutral State, domiciled in his own country, into an enemy, when he became the owner of a quantity of it in the Confederate States.

5. The idea that a neutral subject becomes an enemy *de jure* by furnishing arms, &c., under whatever circumstances, to a belligerent, and renders thereby *all* his movable property, within reach of the belligerent, liable to capture and confiscation, has never been advanced by any publicist, and is not countenanced by any principle of public law.

Mr. Collie's property on land, in the city of Savannah, was *de jure* and *de facto* neutral property, and this Government never had the right, under the public law, to capture, or seize, and confiscate, a bale of it, as the property of an enemy.

6. But if the general public law, as to that property, were otherwise, the United States, by the Act of March 12, 1863, disclaimed all right or intention to deal with it, or to acquire title to it, as prize and booty of war; and this legislation is conclusive upon the judiciary.

IX.

Presumption in favor of Restitution of Property of Neutrals.

The presumption that Congress intended to provide for the restitution of the proceeds of Mr. Collie's property, by the decree of the Court of Claims, arising from the general rules of the public law, touching the immunity of private property on land from belligerent capture and appropriation as *booty* of *war*, is fortified and strengthened by the further consideration, that the United States had no international right or power to restore the property of *any portion* of the inhabitants of the territory, in which this property was

found, and, at the same time, withhold the property of the subjects of a neutral State, domiciled in their own country, captured in the same situation, and under the same circumstances. Any such discrimination against such neutral subjects would be in violation of fundamental principles of public law, and entitle the foreign Government to intervene for the protection of its subjects against the injustice of the United States.

It is impossible to believe that Congress intended to institute such a discrimination against non-resident aliens; and no construction of the Act of March 12, 1863, can be admitted which would have the effect of excluding them from the benefits conferred upon the most favored class of the inhabitants of the insurgent territory of the South, unless the Court should be constrained to adopt such construction by the irresistible force of the express language of the statute.

The general rule of interpretation, heretofore stated, applies with all its authority, namely, that *every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law; and if a statute designs to effectuate any such object, it must express its intention with irresistible clearness to induce a Court to believe that it entertained it.*

1. In presenting the proposition of international law, that the United States had no right to *discriminate* in favor of any portion of the inhabitants of this territory and against the subjects of foreign States, in its bearing upon the intended meaning of the Act of March 12, 1863, it is unnecessary to consider the more general question, how far a belligerent has the right, under any circumstances, to seize any movable property of non-resident neutrals found in the enemy's territory, without incurring liability to them or their Government; for, whether or not non-resident foreigners owning movable property situated in such territory are entitled to stand upon a *better* footing than the enemy-inhabitants,

with regard to the effect of belligerent operations upon their property, no publicist will deny that they have the right to claim that they shall stand upon the *same* footing as the most favored class of those inhabitants, and receive the same favorable treatment which those inhabitants themselves receive at the hands of the belligerent Government.

2. No jurist will pretend to claim that the United States had any right to place the subjects of foreign States, resident under the protection of their own Government, with respect to their property in the Confederate States, upon the footing of the *criminals* of the United States.

3. When Congress refrained from exercising any right it had to make booty of war of the property of the inhabitants of the hostile territory, who were all enemies of the United States, under the public law, and provided for the restoration of that property when captured by military authority, the United States were bound to restore the property of non-resident neutrals found and captured in the same situation; and that duty was and is enforceable against them by all the processes known to the law of nations—*via amicabili*, if possible, *via facti*, if necessary.

It is a monstrous idea, that the Unites States could treat neutral property as prize and booty of war, and, at the same time, exempt the property of their enemies from such treatment.

The question would be, whether any property belonging to neutral subjects could be touched without liability to them, or their Government. However that question is answered, there can be no manner of doubt that any Government which should claim the right to make booty of war of the property of neutrals found in the hostile territory, when it refrained from appropriating the property of the enemy-inhabitants, would not only incur the just indignation and contempt of foreign powers, but subject itself to the consequences incident to an inexcusable breach of international law.

4. There is no reason to believe, from anything contained

in the Act of March 12, 1863, that Congress did not intend to permit non-resident aliens, owning property captured in the insurgent territory, to recover the proceeds of such property upon an equal footing with those inhabitants of that territory who never gave "aid or comfort" to the rebellion. There is everything in that Act to show that Congress *did* intend that non-resident aliens should stand, as they were entitled to stand, precisely on the footing of the loyal inhabitants of the insurgent territory. The words of exclusion or disability relate and refer to such owners of captured property as were under the allegiance of the United States, and do not apply to non-resident subjects of neutral States who did not, and could not, give "aid and comfort" to the rebellion, in the sense of those words as used in the Act of March 12, 1863.

4. It would have been a monstrous usurpation of power, and a monstrous violation of public law, if Congress had undertaken to punish, or affect, such neutral subjects, on account of anything done by them in their relations to the enemy-territory, in the same manner that it punished, or affected, citizens or subjects of the United States, in consequence of their acts of treason and rebellion during the hostilities.

X.

The Acts of Mr. Collie Innocent and Lawful, under the Law of Nations.

There can be no doubt that the Government of the United States had no right or power, under the public law, to deprive Mr. Collie of any of his rights of property in this subject of capture, or withhold from him, or affect, directly or indirectly, his rights of property in this subject of capture, on account of, or in consequence of anything done by him, as disclosed by the record, during the period of hostilities in this country. The presumption, therefore, is that Congress did not intend to affect him with any such penal consequence

with regard to this property, on account of his transactions with the enemy's territory during that period; and this Court will not give any construction to the Act of March 12, 1863, that will inflict upon him such a penalty, *if any other possible construction remains.*

1. The transactions of Mr. Collie, which are imputed to him by the Government as offenses against the United States, were transactions in which he had a perfect right to engage, under the law of nations, and under the municipal law of England, and which the Government of the United States never so much as attempted to prohibit by any statute, and which it could not have prohibited by any statute, which would have received the sanction of the maritime powers of the world, as a lawful exercise of its sovereign powers under the public law.

The acts of Mr. Collie, in the course of those transactions, were perfectly innocent and lawful acts, in the estimation of the public law, as understood by this country and by Great Britain. Mr. Collie had the right to sell and transport and deliver to the Confederate Government all the arms and munitions of war he pleased. He had the right to sell that Government all the ships, or interest in ships, he ever sold them. He had the right to navigate the vessels owned, or controlled, by him, in whatever manner, and employ them in whatever trade, or service, of the belligerent, it pleased him. He had a right to trade in whatever property, or representatives of property, or value, of the Confederate Government, or the State of North Carolina, that he was willing to risk his fortune in. In a word, what he did, and all he did, was in the lawful exercise of his *rights*, under the public law, as a subject of a foreign State domiciled in his own country, and bound, therefore, only to the obligations of international neutrality in the war in which this country was engaged.

That the public law imposed upon him no duty to refrain from any of the acts and transactions mentioned in this record, and that those acts and transactions were not in

contravention of the laws of nations, is one of the *settled facts in the public jurisprudence of the United States*, which was placed upon its present foundations by the statesmanship of Washington and Hamilton and Jefferson, and the juridical and political wisdom of this Court, with Marshall at its head and Story by his side.

The question now and here is, whether the precepts of those great men are to be set aside, to retain in the public treasury a sum of money to which the United States have disclaimed all right or title?

2. The United States had no right to seize and confiscate, or deprive him of, or withhold from him, or affect his rights in, any property whatever, under the control of the Government, on account of those transactions. They had no right to *supplement the penal consequence sanctioned by international law for breach of blockade, or for carrying contraband*, with another and a different penalty, namely: *the capture and appropriation of his property found on land within the territory of the Confederate States, or of any other property belonging to him within the jurisdiction, or under the control, of the Government of the United States.* They had no right, directly or indirectly, to make *reprisals* upon his property anywhere in the United States, for what he did in the way of violating the blockade of, or carrying contraband to, the Southern ports. The United States had no right to *punish* him, in any manner, directly or indirectly, for those acts, or either or any of them.

3. The right of a belligerent to capture and confiscate property involved in maritime commerce carried on by neutrals with a blockaded port, and to capture and confiscate articles of warlike use, furnished by them to the opposite belligerent, is *not* predicated by the public law, upon the ground that the acts of the neutrals who prosecute such commerce, or supply such materials, are *illegal*, or *unlawful*, or *wrongful*, on the part of the neutral, in the sense that they are in violation of any principle or rule of the law of

nations; nor is it justified on any principle of the right of the belligerent to inflict *punishment* on the neutral trader for engaging in such commerce.

It is the international *right* of the neutral to engage in such commerce, subject always to the right of the belligerent to seize the peccant property, if possible, during its transportation to the enemy.

The right of the neutral to carry, stands upon as high ground, under the public law, as the right of the belligerent to capture and confiscate.

This is the great doctrine of neutral rights, in regard to trade and commerce in time of war, for which the world is indebted to the statesmen and jurists of this country, and largely to the eminent judges of this Court.

It was declared by Hamilton and Jefferson in 1793, with the approval of Washington and all his Cabinet. It was reasserted, in 1796, by the Administration of President Adams. It was explicitly declared by this Court, speaking by Judge Story, in the case of the *Santissima Trinidad*. It has been acted upon by this Government in every war since that time in which the United States were a neutral power.

The doctrine is, in the language of Chancellor Kent, that "the *right* of the *neutral* to *transport*, and of the *hostile power* to seize, are *conflicting rights*, and *neither* party can charge the *other* with a *criminal* act." (1 Comm., 142.)

The clearest and best expression of the doctrine, as always maintained in this country, and now recognized in England, has been given by Sir Travers Twiss in the *Preface* (p. xvii) of his work on the *Law of War*. He says:

"The transport of merchandise to the ports of a belligerent is *per se* a perfectly lawful act on the part of a neutral merchant; and it is only by reason of the *accidental uses*, to which certain articles of merchandise may be applied in consequence of war existing between two States, that the right to intercept such merchandise in the course of transport on the high seas to the ports of a belligerent power, and to confiscate it to its own uses, accrues to the adverse belligerent. *The right of the neutral to transport, and of the adverse*

belligerent to seize, are conflicting rights, and neither party can charge the other with a criminal act." (Law of Nations: War, Preface, xvii.)

Sir W. Harcourt says:

"The grounds, it will be seen, upon which the American decisions (as to the validity of contracts of insurance on contraband trade) are founded, are two. The first (which by itself is sufficient to dispose of the question) is, that the transport of contraband is not by the law of nations an illegal trade, in the sense that it is any violation of law or wrongful act on the part of the neutral. *The neutral exercises his right to trade subject only to the adverse right of the belligerent to seize.* But neither the one in transporting, nor the other in seizing, the merchandise, is guilty of an unlawful act. It is a conflict of rights, and not a case of wrong on either side. This is the view expressed by Kent, and which is completely in accordance with the doctrines of Vattel on this point."
(Letters of Historicus, Marine Insurance on Contraband Trade, p. 142.)

The fundamental doctrine of the *coexistence*, or *conflict of rights*, says this accomplished jurist, "*is the real key to the interpretation of the questions which in various shapes arise between belligerents and neutrals.*"

The principle of the *coexistence of rights* lies at the founda- of the public law in regard to neutral trade in contraband and such blockaded ports, as understood in this country, and it has never been departed from by our statesmen or judicial tribunals. The same doctrine is now settled in England by the decisions of Lord Westbury and Dr. Lushington in the cases already cited.

The reasoning of Chancellor Kent, in *Seton* v. *Low*, (1 John. Cases, 1,) of Chief Justice Parsons, in *Richardson* v. *Maine Ins. Co.*, (6 Mass., 113,) and of Judge Story in *The Santissima Trinidad*, (7 Wh., 340,) settled the matter upon that basis for the international jurisprudence of this country.

The only American jurist of any character who has ever ventured to challenge the soundness of the reasoning, or conclusion, of those great judges, is Mr. Duer, who, in

questioning the doctrine of the legality of contracts of insurance on trade in contraband to a belligerent, admits that the universal Continental practice, including Prussia, Sweden, Italy, Hamburg, Amsterdam, and other places, is in favor of such insurances. Mr. Arnould, the English writer on Marine Insurance, accepts the American doctrine without reserve. (Arnould on the Law of Marine Insurance, 4th ed. p. 649.)*

Sir W. Harcourt, as "Historicus," disposed of the whole difference between Mr. Duer and the great judges of our country, before the decisions of Lord Westbury and Dr. Lushington, as well as the flimsy sophistry of some writers of fugitive pamphlets, and lectures, who have ventured to discredit the conclusions of men like Kent, Parsons, and Story. "Like wreckers," he says, "they hang out deceptive beacons, which lure the vessels of the State upon the rocks. The evils of such false teaching are immediate and most disastrous."†

Sir W. Harcourt, speaking of Mr. Duer's observations, says:

"*The true answer to Mr. Duer lies in the principle of the conflict of rights.* The seizure depends *not on the wrongful conduct of the neutral, but on the right of the belligerent.* The right of the belligerent may have been, at some time, and in some cases, more or less extensive, according as the usage and law of nations permitted; but *the right, whatever it might be in the one party, does not create a wrongfulness in the other.*"

Letters of Historicus, p. 144.

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*Mr. Arnould says (citing as his authorities 1 Kent Comm., 142; 3 Id., 267; *The Santissima Trinidad*, 7 Wh., 283; and Lord Westbury's decision in *Ex-parte Chavasse*):

"Commerce in articles contraband of war is not unlawful to a neutral subject; and seizure and confiscation of these articles during their transit to a hostile port are not unlawful to a belligerent power. *They are co-existing rights.* The insurance, therefore, by a neutral of articles contraband of war, being *per se* a valid contract, may be enforced in the courts of the neutral country, provided the nature of the trade and of the goods were disclosed to the underwriter, or there be just ground to presume that he was duly informed thereof."

†These words of Sir W. Harcourt precisely describe the contents of much of a Lecture on *Neutrality*, by a Mr. W. W. Kerr, published in the 2d vol. of the *Juridical Society Papers*.

4. It would have been a flagrant usurpation of power, a palpable violation of the rights of the subject of a neutral State, and therefore an international wrong to his Government, if Congress had assumed to deprive this man of his property, in the situation of this cotton, as a means of punishing him for what he did during the period of our hostilities.

The Court will presume that Congress had no purpose to withhold from him this property, but meant to provide for its restoration by the decree of the Court of Claims, upon the doctrine so often referred to, that "an Act of Congress ought *never* to be construed to violate the law of nations, if any other *possible* construction remains, and consequently can never be construed to effect *neutral rights*, or to effect *neutral commerce*, further than is warranted by the law of nations, as understood in this country." (The Charming Betsey, 2 Cr., 118.)

XI.

Acts of Neutrals Involve only a Certain Fixed Penalty.

But if the transactions of Mr. Collie were unlawful,—that is to say, if they were contrary to the law of nations, and inconsistent with the obligations of neutrality, and in violation of the municipal law of his own country,—there can be no just pretense that the Government of the United States had any right whatever to inflict upon him such a penal consequence as would result from depriving him of the present property, on account of anything done by him in the course and prosecution of those transactions.

1. Whether the Act of a neutral subject, in forcing a valid blockade, or furnishing a belligerent with warlike articles, or doing anything else in aid of a belligerent, is lawful or unlawful, under the public law, one thing is settled, and it is, that the act *involves only a certain fixed penalty, and no other penalty can be inflicted upon him by the opposite belligerent on account of that act.*

It would be just as much a usurpation of power by a belligerent to punish a neutral subject for an unlawful act in a manner not warranted by the public law, as it would be to inflict punishment upon him for a lawful act.

2. The principle of public law is stated in a few words by Sir Travers Twiss:

"If any individual citizen of a neutral State should be guilty of unneutral conduct beyond the limits of its sovereignty, such conduct cannot be charged upon the Government of the State as a departure from neutrality. *Forfeiture of the ship and goods is the penalty annexed to such acts by the Law of the High Seas in time of War;* and if this were not the case, it would be in the power of individual merchants to involve a neutral nation in war against its will." (Law of War, sec. 216.)

Mr. Montague Bernard also observes:

"If we adopt the theory that the neutral is guilty of an unlawful act, we must hold, at the same time, that the act involves only *a certain fixed penalty.*" (Lecture on Alleged Violations of Neutrality by England, p. 29.)

Lord Westbury stated the rule with firmness in the case of *Ex Parte Chavasse* (*supra*, p. 67):

"The title of the belligerent is limited *entirely* to the right of seizing and condemning as lawful prize the contraband articles. He has no right to inflict any punishment on the neutral trader. The belligerent captor cannot visit him with ANY PENAL CONSEQUENCE *beyond the judicial condemnation of the ship and cargo.*"

3. In the early days of the late war, before the Government and people fully realized that the rebellion was, as to neutrals, only a public war, it was the practice in some judicial districts to treat persons taken on board of ships engaged in blockade-running as if they had committed some offense against the United States. They were frequently detained as prisoners, and required, as the condition of their release, to promise in writing that they would not again embark in a like enterprise, or otherwise interfere with the suppression of the rebellion.

The attention of the Government being called to these irregularities, it instructed its officers not to repeat them, and that the persons so treated should be considered as absolved from a promise which ought never to have been exacted from them.

4. The Government also undertook at a certain period to impose exceptional restrictions upon exportations from New York to Nassau in British vessels, with the view of affecting the contraband and other commerce between Nassau and the Confederate ports. The British Government remonstrated against such restrictions, upon the ground that the only penalty of the ulterior trade attempted to be thus embarrassed by the United States was the liability of contraband shipments to be captured on the high seas.

Lord Russell, in his instruction to Mr. Stuart, the *Chargé d' Affaires*, of September 22, 1862, said:

"The trade between Nassau and the so-called Confederate States, is subject to those limitations which the law of nations has established, as legitimate as the trade between Great Britain and any other part of the world. If contraband articles are shipped for any port of the so-styled Confederate States, they are liable to seizure, according to the law of nations; if articles not contraband are shipped for any blockaded place, they may also be seized upon the high seas, according to the law of nations. But the liability of the trade between Nassau and the so-called Confederate States, or any part of it, to be intercepted on the high seas by a maritime capture, according to the rules of international law, does not render the dealings in the articles which supply that trade by British subjects, within British jurisdiction, less lawful and innocent than if there were no such liability, much less does it justify a belligerent Government in superadding to the known belligerent acts of blockade, and of maritime capture, an embargo with its own ports upon any part of the trade of a neutral nation with one of its colonial possessions, merely because this may possibly tend to cripple or embarrass another lawful trade between that country and the country of the other belligerent. The doctrine of the United States on this subject has always been the same as that of Great Britain, namely:

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that neutral Governments are under no obligations to stop a contraband trade between their subjects and a belligerent power, and *that the only penalty of such a trade is the liability of contraband shipments to be captured on the high seas by the other belligerent.* (Papers relating to Foreign Affairs, 1862, pp. 350, 371.)

XII.

No Distinction between the so-called Gifts and Sales of Contraband.

It was supposed by the learned counsel for the Government, in the argument below, that the acts of Mr. Collie in presenting a gun to the State of North Carolina, and giving two guns to the Confederate States, and donating a sum of money for the benefit of the suffering poor of that people, stood upon a different footing and were subject to different considerations, under the public law, from his other transactions, which were denominated distinctively acts of trade. The theory seemed to be, that the acts of the claimant, which were said to be *not* acts of trade, constituted him an enemy *de jure*, whose property was universally, wherever found, on sea or land, the lawful subject of belligerent capture and appropriation or confiscation by the United States. It is manifest, however, that this view, if seriously maintained, is the result of a total misconception of the elementary principles of international jurisprudence applicable to the subject.

1. In the first place, the transactions in regard to the guns and the $30,000 given to the belligerents, considered in the light of the circumstances surrounding them, were trivial matters, which have no international significance different from that which attaches to the general mass of the transactions between Mr. Collie and the Confederate States. They were, then, great customers, and were expected to be thereafter still more valuable customers of this British trader; and the guns and the money were given from business motives and business considerations, and both parties regarded the matter in that light.

Mr. Collie was paid, or expected to be paid, and very well, too, for all he gave to the Confederacy; and the Confederate authorities so understood the matter.

The Turkish Government has no doubt been frequently the recipient of similar favors from American and British manufacturers, and merchants, now engaged in supplying the Porte with the means of defense against Russia.

The Secretary of War, Mr. Cameron, in his report of July 1, 1861, stated:

"A perfect battery of six Whitworth 12-pounder rifled cannon, with three thousand rounds of ammunition, the munificent *donation* of sympathizing friends in Europe, has been received from England." (Miss. Docs., 1st session, Thirty-seventh Congress, 27.)

How many of these "sympathizing friends" were interested in the manufacture and sale of Whitworth guns, we are not informed.

Mr. Webster said, in 1842:

"*As to advances, loans, or donations of money or goods made by individuals to the Government of Texas, or its citizens, the Mexican Government hardly needs to be informed that there is nothing unlawful in this, so long as Texas is at peace with the United States,* and that these are things which no Government undertakes to restrain." (Ex. Doc. 27th Cong., 1841–'42, vol. 5, Doc. 266.)

2. But let it be supposed that these so-called "gifts" of Mr. Collie were made solely to aid the belligerents, and not in the way or interest of trade or business at all, it would still be preposterous to claim that the transactions gave the United States any right with respect to the claimant, and his property under their control, that they would not have had if the transactions had been of a purely commercial or business character. The only remedy furnished a belligerent against a neutral individual for any departure from neutrality (as has been fully shown) is that which he derives from his right to capture and confiscate, *jure belli*, the contraband property involved in the particular hostile transaction.

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3. If the subject of a neutral State, *resident in his own country*, violates any municipal law by a non-neutral act, it is the law of his own country, whose Government alone can hold him responsible for his offense. The only duty of a neutral is to his own Government. He cannot be held amenable to the law of any other State for breach of his duty to his own sovereign.* He cannot, therefore, be punished for any such breach of duty by any foreign State, although the foreign State may have a right to hold the State of which the individual is a member responsible for his noxious acts. It was upon this principle that the United States held Great Britain responsible for the acts of those who fitted out the *Alabama* and other Confederate cruisers. But no jurist ever supposed that the non-neutral acts of those individuals gave the Government any right under the public law to hold them amenable to the laws of the United States, or to treat those persons as *de jure* enemies of the United States, by the seizure and confiscation of their property within the jurisdiction, or under the control, of the United States.

4. The utmost penalty which a belligerent is able, under the public law, to inflict upon a neutral subject, in any case, for his act in supplying the opposite belligerent with warlike articles, is the confiscation of the warlike articles after they have been subjected to capture.

The theory of the public law is that, in every contraband transaction, whatever the interest or motive of the neutral may be, the neutral, by sending warlike articles to a belligerent, renders himself liable to be treated by the opposite party, so far as the particular transaction is concerned, as if he were an enemy, and the special contraband articles, involved in that transaction, as if they were enemy's prop-

*Mr. Hall states the principle with great clearness: "The only duty of the individual is to his own sovereign; and so distinctly is this the case, that acts done even with intent to injure a foreign State are only wrong in so far as they compromise the nation of which the individual is a member." (The Rights and Duties of Neutrals, p. 21.)

erty. Therefore, the belligerent has the right to confiscate the *particular warlike articles*, if he succeed in capturing them before they reach the other party. But as the neutral, domiciled in his own country, is not, and cannot, be an enemy *de jure*, no property of his, except the particular contraband, is liable either to confiscation or capture, by the belligerent. The distinction taken by publicists is between a neutral who may be an enemy *de facto* in a particular transaction, and a domiciled inhabitant of the hostile territory, who is an enemy *de jure*, and whose property is the general subject of confiscation by the other belligerent power. "There is this difference," says Twiss, "between enemies *de facto* and enemies *de jure*, that the former are enemies *sub modo* only, and in reference to *so much of their conduct as is hostile.* The merchant, however, is only considered to be thus far impressed with the hostile character, as regards his unneutral trade. He is so far and no further an enemy *de facto.*" (Twiss, Law of War, sec. 157.)

5. The right of a belligerent to capture and confiscate contraband is founded on the law of *self-defense*, and not upon any principle, that the belligerent has any general jurisdiction to punish the neutral, beyond the penalty involved in the confiscation of the peccant property. It is so treated by the great modern authorities.

Twiss says:

"The right of commerce, although it be a right of natural society, is not a paramount right; and whenever the right of commerce comes into evident conflict with the *right of self-defense*, which is a paramount right, the exercise of the former must be subject to restriction." (War, sec. 214.)

Hautefeuille says:

"The seizing and taking of the contraband articles *can never be considered as a punishment applied to a guilty party.* If they had that character, it would be necessary to interdict them to a belligerent, because *he has no quality to pronounce a punishment against a neutral, against the subject of a foreign State. This right only belongs to him who possesses the*

jurisdiction. As to a punishment, if one is to be applied, the chief of the injured nation should address himself to the neutral sovereign, and ask that the guilty parties should be tried in their own country, and according to its laws. *The power of the belligerent is not to punish the author of the act which injures him, but to prevent this act from being consummated,* that the contraband should not be carried into the country of his enemy; to seize these articles when they are destined to the ports of his adversary." (Droits des Nations Neutres, tom. iii, pp. 224, 234.)

Ortolan says:

"They expose themselves to the acknowledged right of the powers at war to interpose obstacles to the transportation of such articles. The consequence is, that this merchandise may be stopped on its way, and, the international reason adds, in order to give more efficacy to the prohibition, it shall be subject to confiscation." (Diplomatie de lar Mer, tom. ii, liv. iii, ch. 6, p. 187.)

The belligerent right of capture and confiscation thus does not depend on the particular intent of the neutral, whether it is to injure the belligerent, or simply pecuniary gain. The intent of the transaction is not a matter which the public law considers in fixing the penalty which the belligerent is authorized to impose on a neutral who sends warlike assistance to his enemy.

5. The right of the belligerent, in any case, to confiscate even the noxious articles, is denied by some jurists, who contend that the only right of the belligerent is to *seize* the property, and either return it to the neutral at the close of the war, or pay its value.* (See Reddie's Maritime International Law, vol. ii, pp. 185, 186.) But the usage of nations has intervened, and given the belligerent the right not merely to seize, but also to forfeit the contraband articles. With this right, however, ends the power of the belligerent over the neutral individual and his property.

*This principle of *preëmption* as to contraband is embodied in all our treaties with Prussia, (*infra.*) and is said by Klüber to express the true doctrine of international law. Reform in the law of contraband, which was desired by Mr. Marcy, will probably be in this direction.

XIII.

The Transactions not in Violation of the "Foreign Enlistment Act."

It would seem unnecessary, before this learned Court, to enter upon any argument to show that the Queen's Proclamation of the 13th of May, 1861, had no effect upon the validity, or legality, of any of the transactions of Mr. Collie, as set forth in this record, or that none of those transactions were in violation, or derogation, of the British Statute of 59 Geo., 111, c. 19, 1819, known as the "Foreign Enlistment Act."

1. It is well-settled principle, that the object and effect of a "Proclamation of Neutrality" are simply to warn the subjects, or citizens, of the neutral State, that they will incur, by doing certain things, penalties imposed by the law of nations, against which that Government will not protect them, and by doing certain other things denounced by the Statute of Neutrality, penalties imposed by that statute, which the Government would enforce against them.

So far as acts within the penalties of *international law* are concerned, the Proclamation merely calls attention to the liabilities which those who engage in certain transactions incur under that law.

The British Proclamation did not operate as a municipal *prohibition* of those acts, or constitute any of them an *offense* against English law.

The proposition was directly adjudged by Lord Westbury, in *Ex Parte Chavasse* (*supra*, p. 69):

"It is the object of a proclamation to make known the existing law, and it can neither make nor unmake law; but, in truth, the proclamation of 1861 is directed to two objects—first, to declare that the provisions of the Foreign Enlistment Act would be strictly enforced; and, secondly, *not* to *prohibit* the exportation of warlike stores, but to warn the subjects of the realm that if any subject carried contraband to either belligerent, he would incur the penal con-

sequences, and would receive no protection or relief from *those consequences* [that is, from *capture* and *condemnation*] at the hands of Her Majesty. The Proclamation has no effect whatever on the legality of this adventure."

The most carefully-prepared Proclamation of Neutrality ever issued was that of President Grant, in the Franco-German war. That Proclamation, after reciting the provisions of the Act of 1818, declared as follows:

"While the free and full expression of sympathies in public and private is not restricted by the laws of the United States, military forces in aid of either belligerent cannot lawfully be originated and organized within their jurisdiction; and that while all persons *may lawfully and without restriction, by reason of the aforesaid state of war, manufacture and sell within the United States, arms and munitions of war, and other articles, ordinarily known as 'contraband of war,'* yet they cannot *carry* such articles upon the high seas, *for the use or service of either belligerent, nor can they transport soldiers and officers of either, or attempt to break any blockade* which may be lawfully established and maintained during the war, *without incurring the risk of hostile capture, and the penalties denounced by the law of nations in that behalf.*"

* * * * * * * *

With this proclamation before him, it would seem impossible for an American lawyer to cite, as worthy of any consideration, the idle crotchet of Phillimore, that every sale of munitions of war is a "clandestine evasion" of the Foreign Enlistment Act, especially as the author has admitted, in his last volume, that his "*theory has not been justified by the practice of States.*" (Phillimore, Int. Law, 2d ed., 3d vol., p. 410.) Phillimore's notions are founded wholly upon the unauthorized speculations of Galiani, whose work was refuted by the great Lampredi, the jurist, whose teachings constitute the foundation of our American public law of neutral rights. Mr. Wheaton treats the notions of Galiani with deserved contempt. (History of Law of Nations, p. 312.) And Sir W. Harcourt refers his readers, as an antidote to Galiani, to the writings of "a guide who will never

lead them astray—to the greatest jurist whom this age has produced—the American Chancellor Kent." (Letters of Historicus, p. 129.)

2. It is equally clear that the "Foreign Enlistment Act," of 1819, had no effect on the validity or legality of Mr. Collie's transactions, or any of them. They were wholly outside of the provisions, and the penalties, and the scope and provisions of that statute, which did not touch or affect them, or contemplate them, or prohibit them, or provide against them or any of them, directly or indirectly, in any manner, shape, or form whatever. The vessels used by Mr. Collie in his maritime trade with the Confederate ports were one and all regular merchant vessels, and were employed only in commercial adventures, and not at all, and never, as armed cruisers against the United States, or as transports, or store-ships in the service of the Confederate Government.

(*a*) The fact that the belligerent had an interest in some of the vessels, is a matter of no importance or interest for us in this discussion. They were ships intended for, and employed in, commerce and commercial adventures, and in enterprises of no other description, whoever owned them. A belligerent power may own vessels, or have interest in vessels, for purposes of trade, as well as individuals.

The vessels belonging to a Government are not necessarily ships of war. They are not ships of war unless they are used for war. A belligerent Government has the right to buy and own vesiels for commerce, and neutrals have the right to furnish in their home markets, or in the belligerent territory, all such ships the necessities and purposes of the belligerent require. This was a part of the regular business of our ship-builders, and ship-owners, during the wars of the French revolution; and the fact was expressly recognized in the schedule of rules appended to the circular instructions of Mr. Hamilton, as Secretary of the Treasury, to collectors, of August 4, 1793, intended to provide against violations of neutrality.

The first three rules sound the key-note of the whole matter.

1. The original arming and equipping of vessels in the ports of the United States, by any of the belligerent parties, for *military service*, offensive or defensive, is deemed unlawful.

2. Equipment of *merchant vessels*, by either of the belligerent parties, in the ports of the United States, purely for the accommodation of them as such, is deemed lawful.

3. Equipments in the ports of the United States of vessels of war, in the immediate service of the Government of any of the belligerent parties, which, if done to other vessels, would be of a doubtful nature as being applicable either to commerce or war, are deemed lawful.

(1 American State Papers, Foreign Relations, p. 141.)

Commercial vessels, owned by a belligerent power, are entitled, under the public law, to the same immunities, rights, and privileges, in neutral ports, as the merchant ships of private individuals. The character of the owner does not change or affect the character of the ship, if she is a commercial vessel, or the business in which she is engaged, or the rights of the owner, or those concerned in the employment or the trade of the vessel. The 7th section of the British Act of 1818, prohibits any person to "equip, fit out, or arm, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel *with intent or in order* that such ship or vessel shall be *employed* in the service of any foreign prince, &c., to *cruise or commit hostilities* against any prince, &c., with whom His Majesty shall not then be at war."

The elements of the offense, under this section, are—1st, the act of equipping, furnishing, fitting, or arming of a vessel; and, 2d, the intent that the vessel *should be employed in belligerent operations, as described in the section.*

The *intent* is the great thing, and furnishes the test, of every transaction with regard to vessels in a neutral port, as has been shown with marvelous clearness by Mr. Dana, in his *note* on *The Neutrality Acts.* (Wheaton, p. 563.)

Mr. Dana says:

"Is the intent one to prepare an article of contraband

merchandise, to be sent to the market of a belligerent, subject to the chances of capture and of the market? Or, on the other hand, is it to fit out a vessel which shall leave our ports *to cruise, immediately or ultimately, against the commerce of a friendly nation? The latter we are bound to prevent. The former the belligerent must prevent.*"

It would, of course, be absurd to claim that a neutral who prepares or fits out a commercial ship, in which a belligerent power has some interest, for the trade she is carrying on, equips or fits out a ship *with intent that she shall be employed to cruise or commit hostilities.* He does no such thing. He does the very opposite thing. The vessel does not propose to cruise; and the neutral who fits her out has no intent that she shall do so, and does not fit her out for the purpose of committing hostilities. The act of the neutral who thus, within neutral jurisdiction, prepares a vessel of a belligerent power for trade and commerce, is perfectly lawful under the law of nations, and is not touched by the Foreign Enlistment Act of Great Britain or the United States.

(*b*) The theory was suggested, in the argument below, that the vessels of Mr. Collie, in which the Confederate Government and North Carolina had some interest, ought to be regarded as "transports" or "store-ships," (which it was not said,) within the meaning of the 7th section of the Foreign Enlistment Act, which renders it unlawful to equip a ship with intent that she shall be employed, etc., as a transport or store-ship. But, if truth and accuracy, and not rhetoric and sentiment, are what are wanted in this discussion, such a proposition can meet with no favor at the hands of the court. These vessels were not in the service of the belligerent as transports or store-ships, in any proper sense of the terms, which describe public vessels distinctively in the military or naval service of a belligerent power. The character of their outward cargoes as contraband of war did not make them transports, or store-ships, any more than the vessels of the French line of steamers, carrying the mails between New York and Havre, were converted into transports, or store-ships, when they were employed to transport

regularly cargoes of arms and munitions of war for the French Government, during the late war between France and Prussia.

On September 20, 1870, the steamer *Lafayette* carried out from New York 6,000 rifles, 3,000,000 cartridges, and between 500 and 600 Frenchmen, to join the French army. On the 4th of October, the *Ville de Paris* carried out about 90,000 Remington, Springfield, Enfield, and Spencer rifles and carbines, about 8,000,000 cartridges, and about 600 Frenchmen, destined for the French army. She was so full that she could not take 3,000 more arms intended for her. On the 20th of October, the *St. Laurent* sailed with a similar cargo. On the 1st of December, the *Ville de Paris* left New York for Havre with contraband of war for the French Government, as follows: 17,600 muskets, 28,320 rifles, 5,200 carbines, 10,267 cases of cartridges, 25 cases of harness.

The shipments of arms for the French Government, on the French steamers, which were controlled by that Government, were not only perfectly well known to the authorities of the United States, but they were sanctioned by them, as large amounts of these arms were purchased from the United States, and carried directly from the public arsenals to the vessels in the port of New York.

The shipments of arms and 600 men, on board of the *Lafayette*, having been brought to the attention of Mr. Fish, the Secretary said, "that with regard to the ship *it could not be alleged that she was intended for hostile purposes against North Germany;* as for the arms and ammunition, they were articles of *legitimate commerce*, with which the United States would not interfere, although the vessel might run the risk of being detained by the cruisers of North Germany on her voyage to France."

Not only French, but American steamers, were largely and regularly engaged in this contraband trade during the French and German war. The American steamer *Erie*, of 2,900 tons, left New York for Cowes on the 29th of November, 1870, with 120,800 muskets, 1,760 carbines,

and 21,356 cases of cartridges, for the French Government.

(See correspondence between Sir Edward Thornton and Earl Granville, Parliamentary Papers, "Blue Book," Franco-German War, No. 1, 1871.)

Mr. Collie's transactions in furnishing military supplies to the Confederate Government were not different, in any respect, from those in which the arms manufacturers and shipping merchants of the United States were engaged, during the Franco-German war, under contracts with the French Government.

The New York and Havre line of steamers belonged, we believe, to the *Compagnie Transatlantique*, but they were running at this time under a contract with the French Government for the carriage of the mails. They were thus substantially vessels of the French Government; but they were not "transports" or "store-ships," when engaged in transporting contraband cargoes for the French Government. They were engaged in a lawful commerce, under the law of nations and the law of the United States, and so Mr. Fish thought and said to the German Minister and the local officers of the United States.

XIV.

Other Complaints against the Claimant.

The United States associate with the complaints as to alleged violations of the Queen's Proclamation and the "Foreign Enlistment Act," other complaints, founded on alleged violations, on the part of Mr. Collie, in the navigation of his ships, or some of them, of the provisions of the British statutes as to merchant shipping; but it would seem quite unnecessary to say that, if any violations of those statutes occurred in the case of the vessels, or any of them, it was a matter of purely domestic concern, and municipal cognizance, with which the United States had nothing whatever to do, under the law of nations.

1. The rights of visitation and search, and of belligerent capture and confiscation, upon grounds warranted by the public law, were exercisable against these vessels, independently of, and without reference to, any outward evidences of nationality borne by them on the high seas. Any *enemy-interest* in them was, of course, confiscable as prize of war, independently of the liability of the vessels to condemnation for breach of blockade, or for carrying contraband of war, or as employed in the enemy's service, and the British credentials afforded no protection against the exercise of the belligerent right of the United States to capture the ships and confiscate any such interest in the vessels as enemy's property. It is no inconsiderable part of the ordinary occupation of the Prize Courts to scrutinize the neutral credentials accompanying vessels and other property engaged or involved in trade with an enemy's ports; and it has never been supposed that a belligerent had the right to hold a neutral subject who associated himself with hostile property, responsible for such transactions, beyond the liability of his own interest, under certain circumstances, to condemnation as lawful prize, if the property should be subjected to maritime capture. The law of nations afforded the United States complete and adequate protection against all concealment and disguise of any hostile interest in these vessels, in their belligerent rights of visitation, search, capture, and condemnation, as actually, or constructively, the property of enemies of the United States.

2. It does not lie in the mouth of this country to complain of transactions of any neutrals in attempting to throw around hostile property on the high seas the protection of the neutral character, for purposes of trade in time of war. Our merchants and ship-owners, when neutrals in former wars, have been the great coverers of enemy's property, as anybody may discover who reads the judgments of Lord Stowell, and that eloquent pamphlet of a British jurist, entitled *"War in Disguise, or Frauds on the Neutral Flag,"*

which discloses the operations of American commerce with the colonies of the enemy, during the wars of the French Revolution, in violation of the principles of "Rule of '56."

XV.

The American Doctrine of No Confiscation for Contraband.

The Government of the United States having succeeded in rendering it a maxim of public law, that trade by neutrals with a belligerent in merchandise of whatever kinds or description is not unlawful, and after nearly a century of strenuous endeavor to secure for neutrals the largest liberty of commerce, in time of war, this Court, who has done more than any other tribunal in the world to place the rights of neutrals on their present foundations, is now invited to declare that a belligerent has the power to seize and confiscate *all* property under its control, belonging to a *neutral merchant*, who exercises his rights of commerce under the protection of the great American doctrines of public law.

1. The American law of contraband has an interesting and peculiar history in the political and juridical experience of this country. The policy of the United States has been to secure the abolition of the principle of belligerent confiscation for contraband, from the conventional law and usages of nations, as part of a larger national policy to promote the unrestricted freedom of neutral commerce in time of war, and the abolition of all warfare against *private property* from the law and practice of nations.

In 1781, we declared our adhesion to the doctrines of the armed neutrality of 1780, which limited *contraband* to articles directly useful in war.

On May 17, 1784, Congress passed a series of resolutions, intended for the instruction of their foreign ministers, declaring the principles on which treaties should be negotiated with the maritime powers.

These instructions required the foreign ministers to negotiate, if possible, for the principle, among others, of the *abolition of any confiscation for contraband.* (Trescot, American Diplomacy, p. 21; Diplomatic Correspondence, 1783–89, Vol. I, p. 114.)

They also embodied the neutral doctrine of *free ships make free goods,* and that war should be confined to armed men—*war for arms, and peace for commerce.*

In our treaty with Prussia, of September 10, 1785, which bears the names of Jefferson, Adams, and Franklin, we secured a stipulation which exempted contraband of war from belligerent confiscation.

This provision was again incorporated in the subsequent treaties between the United States and Prussia, of July 11, 1799, and May 1, 1828.

The 13th article of the treaty of 1799, now in force with Prussia, stipulates that, in case of one of the parties being engaged in war with any other power, no articles "*carried in the vessels or by the subjects of either party to the other, shall be deemed contraband, so as to induce confiscation or condemnation, and a loss of property to individuals.*"

The article then provides:

"Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed *to use in the service of the captors the whole or any part of the military stores so detained,* PAYING THE OWNERS THE FULL VALUE OF THE SAME, TO BE ASCERTAINED BY THE CURRENT PRICE AT THE PLACE OF ITS DESTINATION. But in the case supposed, of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not, in that case, be carried into any port, nor further retained, but shall be allowed to proceed on her voyage."

The great jurist, Mr. Klüber, regards this provision of

our treaty with Prussia as the established law in the international code in Europe. He says:

"*La confiscation de la contrebande de guerre*, et encore moins celle des autres marchandises qui se trouvent dans le meme convoi ou des, moyens de transport, comme batimens, chariots, chevaux, etc., *ne peut donc etre justifiee en principe.*" (Klüber Droit des Gens, Moderne de l' Europe, vol. II, § 239, p. 96.)

President Washington issued his celebrated proclamation of Neutrality on 22d of April, 1793; and on the 4th of August, 1793, Mr. Hamilton issued his Instructions to Collectors, embodying the views of the Government as to its duties of neutrality in the existing war; and declaring the principle that trade in contraband was not a violation of international neutrality. (See *supra*, page 58.)

Mr. Hamilton's instructions were approved by General Washington, and all his Cabinet. (Sparks's Washington, vol. 10, p. 345; 4 Hamilton's Works, p. 457; 9 Jefferson's Works, p. 158.)

In the same year, and in the same war, Mr. Jefferson conducted his celebrated correspondence with Mr. Hammond, the British Minister, upon the basis of the "Instructions" of General Hamilton, (*supra, p.* 58,) and declaring again that the sale and exportation of contraband of war was lawful commerce, and could not be restricted by the Government. (9 Jefferson's Works, 158.)

In 1793, Mr. Jefferson, in his correspondence with Mr. T. Pinkney, touching the British Instructions of June 8, 1793, as to provisions, declared the rights of neutral trade in these grand words:

"When two nations go to war, other nations, who choose to remain at peace, retain their *natural right to pursue their agriculture, manufactures, and other ordinary vocations, to carry the products of their industry for exchange to all countries, belligerent or neutral, as usual;* to go and come freely, without injury or molestation; in short, that *war among others should be for neutral nations as if it did not exist.*

"The only restriction to this general freedom of commerce

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"The only restriction to this general freedom of commerce

which has been submitted to by nations at peace, was that of not furnishing either party implements merely of war, nor anything whatever to a place blockaded by its enemy." (1 Waite's State Papers, 398.)

In 1796, the question as to contraband was elaborately discussed between Mr. Pickering, as Secretary of State, and M. Adet, the French Minister, and Mr. Pickering maintained the incontrovertible right of "*the citizens of the United States to sell and export contraband of war to any of the belligerent powers.*" (Mr. Pickering's Letters to M. Adet, 1796; 1 American State Papers, Foreign Relations, 649.)

In our treaty with France of September 30, 1800, and in numerous other treaties, we introduced stipulations providing for the delivery up of contraband goods, and allowing the vessels to proceed on their voyage without capture.

The 17th article of the treaty with France provided:

"If it shall appear from the certificates, that there are contraband goods on board any such ship, and the commander of the same shall offer to deliver them up, the offer shall be accepted, and the ship shall be at liberty to pursue its voyage, unless the quantity of the contraband goods be greater than can be conveniently received on board the ship of war, or privateer, in which case the ship may be carried into port, for the delivery of the same." (8 Statutes at Large, 186.)

The same principle is embodied in nearly all our treaties with the South American States. (8 Statutes at Large, 314.)

The United States have been careful to stipulate in all their numerous treaties containing provisions in regard to contraband, with the exception of the treaty with England of 1794, that contraband shall be confined to *arms* and *munitions of war*. (8, 9, 10, 11 Statutes at Large.) They have thus explicitly adopted and approved the French system in regard to contraband, which rejects the theory of *conditional* contraband, and confines it to articles which serve *directly and exclusively* for belligerent purposes. (Ortolan, Diplo-

matie de la Mer, liv. iii, ch. 6, tom. ii, pp.179–206 ; Hautefeuille, Droits des Gens Neutres, tom. iii, p. 412.)

The question as to *ships* being legitimate objects of commerce, was decided in the affirmative by Attorney-General Rush, in 1816, after passage of our Neutrality Act of 1794, and before the passage of the Act of 1818, and four years after the passage of the Act of 1818, this Court held that there is *nothing in the public law, or the municipal law of this country, that interferes with the sale by neutrals, in a market, of even ships of war to a belligerent.* (1 Opinions Att'y Genl., 190 ; *The Santissima Trinidad*, 7 Wh., 283.)

Mr. Wheaton and Mr. Dana recognize this doctrine as sound public law. (Wheaton, History of the Law of Nations, 312 ; Dana's Wheaton, p. 563, *note.*)

In 1842, Mr. Webster, during a civil war, held that there was nothing unlawful in our citizens making "advances, loans, or *donations* of *money* or *goods*, to the Government of Texas, or its citizens." (Ibid.)

In 1854, during the war between England and Russia, President Pierce, in his Message to Congress, expressed the view of the Government, that our merchants and ship owners were free to employ their vessels in the transportation of munitions of war, and provisions, and even *troops*, for the belligerents. (*Supra*, p. 61.)

In 1856, when the Governments who were parties to the Declaration of Paris, asked the adhesion of the United States to it, Mr. Marcy, in declining to become a party to it unless an article should be added protecting from capture all private property at sea, not contraband, declared, in his celebrated despatch to Count de Sartiges of July 14, 1856, that the United States were ready to negotiate with the other maritime powers for the *abandonment of the doctrine in relation to contraband trade*, holding that neutrals "*ought to be left to pursue their ordinary trade with either belligerent, without restrictions in respect to the articles entering into it.*" (President's Message and Docs., 1856–7, p. 43.)

Coupled with this was, also, a proposal to surrender the right of visit and search, and the complete liberty of neutral commerce, excepting with blockaded places.

In 1859, during the Italian war, Mr. Cass, in his letter to Mr. Mason of June 27, 1859, instructed the American ministers to conclude conventions for abolishing *commercial blockades*, and confining blockades to places actually besieged. (President's Mess., 1859, 1860, p. 31.)

In 1870, during the Franco-German war, after the President had issued his Proclamation of Neutrality of August 22, 1870, immense quantities of arms and munitions of war were notoriously exported from New York on board of American and French steamers, by agents of the French Government; and a great number of these arms were actually purchased from the Government of the United States itself, and were brought in barges directly from the arsenals at Governor's Island, and the Navy Yard at Brooklyn, and transferred to the French steamers. (Sir E. Thornton to Earl Granville, Parliamentary Papers, Franco-German War, No. 1, 1871, p. 204.)

This history shows the national sentiment of this country, that business of the character of that in which Mr. Collie was engaged, and which is now imputed to him as wrongful and illegal, and a grave offense against the law of nations, was as innocent and lawful, and as legal, under the law of nations, as any commerce in which a merchant can engage in time of profound peace; and, further, that the existing privileges of belligerents, in regard to such trade, are in derogation of the common rights of maritime commerce, which nations are entitled to exercise in time of war, as well as peace, and are privileges which it is the interest of maritime nations not only to restrict within the narrowest limits, but to eliminate wholly from the public law.

XVI.

The Policy and Purpose of the Statute.

It was manifestly the scheme and design of the Captured and Abandoned Property Act of March 12, 1863, to impose a disability to reclaim and recover the proceeds of captured property upon those persons *only* who committed and were guilty of the *municipal crime of giving aid and comfort to the rebellion*, and to restore to all other persons whose property should or might be affected by operations under the authority of the act, the proceeds of captured property, on application within two years from the close of the war.

1. The general object of the statute was to secure the withdrawal from hostile control of such private property in the insurgent territory as might be made contributory to the strength of the hostile cause; and with this view it directed that all property that might be made the subject of capture, except property "which has been used, or which was intended to be used, for waging or carrying on war against the United States," should be turned over to the appropriate agent, and sold, and that the proceeds of such sales should be paid into the Treasury of the United States.

The act then provided:

"And *any* person claiming to have been the owner of *any* such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims, and on proof to the satisfaction of said Court of his ownership of said property, of his right to the proceeds thereof, and that he has never *given any aid or comfort to the present rebellion*, to receive the residue of said proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expense attending the disposition thereof."

The sphere of the operation of the statute was the States, or parts of States, "designated as in insurrection against the

lawful Government of the United States, by the proclamation of the President of July 1, 1862."

This territory was *enemies'* territory; the inhabitants were *enemies* of the United States; and, as such, their property was *enemies' property*, and everywhere the lawful subject of capture and confiscation by the United States. (The Prize Cases, 2 Black, 687; Mrs. Alexander's Cotton, 2 Wall., 419.)

The inhabitants were of two classes: *first*, those who, although residing in the hostite territory, and were thus enemies, gave no voluntary aid or comfort to the rebellion, and were, therefore, guiltless of treason against the United States; and, *second*, those who, by voluntary acts of participation in the rebellion, were guilty of treason, and were thus not only enemies, but also rebels or traitors. All of the inhabitants were *enemies;* but some were not only enemies, but also *rebels*, or traitors, or, as they have been designated, *rebel-enemies*.

It is manifest that it was the purpose of Congress to distinguish between these two classes of persons, all of whom were enemies, in regard to their right to recover from the Government the proceeds of their captured property; and that the only class intended to be affected with any disability to reclaim such property, were those who were rebels or traitors. The military capture of property in the territory was intended to be sanctioned; but from those only who had committed treasonable offenses was it meant to withhold the right to recover the proceeds. The property of all the rest was to be restored on application within two years from the close of the rebellion.

The fact that the technical words "*aid or comfort*" are used in the statute, with special reference to the situation and relations of the inhabitants of the disloyal States, shows unmistakably the sense in which Congress intended to use those terms.

But while the legislation was based upon the view, that the property intended to be affected by it, was generally owned by persons residing in the hostile territory, the provision of the statute by which the right is given to recover

the proceeds of property there captured, is general in its terms, and includes all persons, whether residing South, or North, or in foreign countries, and the grant is upon the same conditions to all alike,—namely, that they were not guilty of any treasonable participation in the rebellion, and made application, within two years from the close of the war, for the restoration of the proceeds.

2. The intention of Congress to affect those only who were guilty of such offenses against the United States, by disability to recover the proceeds of their captured property, is manifest further from the property *excepted* by the statute from its operation, as well as from the subsequent act of July 2, 1864, in regard to property "seized upon any inland waters by the naval forces of the United States."

(*a.*) The proviso of the 1st section of the act of March 12, 1863, excepts from the operation of the statute, "all property which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other water craft, and their furniture, forage, military supplies, or munitions of war."

This property, by whomsoever owned, whether by those who were loyal, or by those who were disloyal, was made the subject of absolute appropriation as *booty of war*. The proceeds were not to be preserved for the benefit of loyal owners, and no rights were reserved to loyal owners in respect to this excepted property. By whomsoever owned, whether by the guilty, or the innocent, all such property, when captured, became booty of war.

The 7th section of the act of 1863, until repealed, as to captures on inland waters, by the act of 1864, excepted also, from the operation of the act, all property captured "*as lawful maritime prize by the naval forces of the United States.*" All such property, if owned by enemies, was to be condemned, and not held for the benefit of the owners, and no distinction was made, or intended, between owners who were loyal and owners who were disloyal. If the owners of prop-

erty, captured by the naval forces as prize, in the insurgent territory, were enemies, whether rebels or not, the property fell under the operation of the general law of war, and was confiscable to the United States as *enemy's* property.

In *Mrs. Alexander's Case* (2 Wall., 422) the question arose before this Court, whether property captured on *land* by the naval forces of the United States, was maritime prize, within the meaning of the 7th section of the act of 1863, and as such within the jurisdiction of the prize Courts, or, whether such property was to be administered under the provisions of the Captured and Abandoned Property Act for the benefit of the owners?

The cotton was enemies' property, as the Court held; but was it to be adjudicated upon by the prize Court? This Court said it was not to be so adjudicated, and was to be turned over to the agents of the Treasury, to be disposed of under the act of March 12, 1863; and, by this decision, the Government lost its prize interest in all naval captures of property on land within the insurgent territory; and the proceeds of such captures were ultimately restored, under the act of 1863, to the respective owners. The Chief Justice, in this case, defines, with precision, the object and effect of the act of 1863. He says: "In this war, by this *liberal* and *beneficent legislation, a distinction is made between those whom the rule of international law classes as enemies.* All who have in fact maintained a loyal adhesion to the Union, are protected in their rights to captured, as well as abandoned, property."

(*b.*) The subsequent act of July 2, 1864, by its seventh section, applied the act of 1863, to property taken "upon any of the *inland waters* of the United States," which it declared should not be regarded as maritime prize. By this provision the United States lost their prize interest in captures made on the *inland waters*, as it lost, by the decision in Mrs. Alexander's, Case its prize interest in naval captures on *land*, within the insurgent territory.* *Maritime* captures of enemies' prop-

*The Court of Claims, in *Cook's Case*, (9 Court of Claims, 288,) restored the proceeds of property captured on land by the navy, although

erty in that territory were thus placed, in effect, under the jurisdiction of the Court of Claims. The act of 1864 was cited and commented on in *Mrs. Alexander's Case;* "it is cited," said the Chief Justice, "in illustration of the general policy of legislation, to *mitigate, as far as practicable, the harshness of the rules of war,* and preserve for *loyal owners,* obliged by circumstances to remain in rebel States, all property, or its proceeds, to which they have just claims, and which may in any way come to the possession of the Government or its officers." (2 Wall., 423.)

3. It is written thus all over the face of the act of 1863, that Congress intended to distinguish radically between those whom the public law classed as enemies, and to mitigate the harshness of the strict rules of war, by preserving for those who were innocent of the offense of treason against the Government, although enemies, all property or its proceeds, to which they had just claims, and which might in any way come to the possession of the United States.

The purpose clearly was to affect with the statutory disability only those who were guilty of offenses of the class of the *crimen majestatis,* of which allegiance is a necessary ingredient; and the property of all other persons, whether captured on land by military or naval forces, or captured on inland waters by naval forces, was intended to be restored, through the restoration of its proceeds, by judgment of the Court of Claims.

The statute discards the idea of appropriating, ever so indirectly, as *booty of war,* any property captured on land, owned by persons who were not personally guilty of *some overt act of treason against the United States,* during the progress of the rebellion. The disability imposed by the act, upon certain persons, was directed, and intended to be, to *that* offense, and, in a measure, as *punishment* for that offense; and in that view of the statute alone can the decisions of this Court,

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they had been condemned by a Prize Court of the United States, and the money distributed pursuant to the decree; and this, under the authority of *Mrs. Alexander's Case.*

in regard to the effect of pardon upon the disability, be reconciled with reason or common sense.

XVII.

The Words of the Act of 1863 Import the *Crime* of Giving "Aid or Comfort to the Rebellion," as Described by the Act of 1862.

We come now to consider the very *words* and the precise *language* of the 3d section of the Act of March 12, 1863; and we submit that they show, with irresistible clearness, that the acts, and the only acts, which Congress intended should impose upon the owner of captured property a disability to maintain a suit for the recovery of the proceeds of such property, were such acts as *constituted a crime against the United States under the statutes prescribing punishment for treason, and for giving aid and comfort to the then existing rebellion.*

The object and design of Congress were to affect those who were guilty during the rebellion of some offense of the class of the *crimen læsæ majestatis*, and those only, with the specific disability created by the statute. Congress meant, in other words, to brand rebels, or traitors, and no others, in the great rebellion, with that disability.

The subjects of foreign States, domiciled in the territory of their own sovereigns, being under no obligation of allegiance to the United States, were not capable of giving "*aid or comfort to the rebellion,*" and did not, by engaging in acts which *de facto* gave assistance to the rebellion, give "*aid or comfort to the rebellion,*" in the sense of this statute; and they are, therefore, not affected with any disability to recover the proceeds of their captured property by decree of the Court of Claims.

1. The purpose of the statute was to withhold the proceeds of property captured on land, within the insurgent territory, belonging to those persons who committed certain acts of

participation in the rebellion; and it designates those acts as "*aid or comfort to the rebellion*," which are terms possessing a well-understood meaning and a well-defined signification, in the municipal jurisprudence of the United States—describing the political crime of *treason* under the Constitution and laws of the United States.

The accepted canons of construction require that the words of the statute should be interpreted in their *juridical* sense, and should be understood as importing the *crime* of giving "aid or comfort to the rebellion," as that crime is defined and punished in the criminal law of the United States.

Acts which did *not* constitute "aid or comfort to the rebellion," in the criminal jurisprudence of the United States, were not within the contemplation or purview of the statute of March 12, 1863; and those who engaged in such acts were not intended to be affected with the disability created by that statute, with respect to the recovery of the proceeds of captured property.

This is the natural, and, we think, the necessary construction of the statute; and it harmonizes it with the general public law, with reference to which all municipal legislation of the United States must be understood as having been undertaken, and as having been intended to conform. The statute in this view affects with the punitive disability, all persons subject to the jurisdiction and sovereignty of the United States, and who, therefore, owed obedience and allegiance to the laws of the United States, and who, by the Constitution of the United States and the public law of nations, were liable to be affected with punishment for giving "aid or comfort to the rebellion."

The statute, in the view presented, does not purport to punish any person who did not owe obedience and allegiance to the United States, by depriving him of the right to recover his captured property, and, therefore, does not assume to punish, in that manner, any person who, by the Constitution of the United States and the law of nations, was not amenable to the jurisdiction and legislation of the United States.

All persons whom the Government of the United States had a *right* to punish for rendering assistance to the rebellion, are thus affected with the punitive disability adjudged by the statute, and all persons whom it had *no* right to punish for engaging in acts which gave assistance to the rebellion, are not deprived of their rights of property. Harmonized as the statute is with the public law of nations, by the construction of the disabling provision which is now submitted, it seems impossible to doubt that this Court will accept that construction as expressing the true intent of the legislation.

2. The rule of construction which the Court will employ in determining the meaning of and intention of Congress in the use of the words found in the provision of the third section of the Act of 1863, under consideration, was laid down and applied by Chief Justice Marshall in *Burr's Case*, when he came to ascertain the meaning of the words "levying war against the United States," in the definition of treason contained in the Constitution.

He said:

"The term 'levying war' is not for the *first* time applied to treason by the Constitution of the United States. *It is a technical term.* It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the word was not employed by the framers of our Constitution in the sense which has been affixed to it by those from whom we borrowed it. *So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in their ascertained meaning, unless the contrary is proved by the context.*" (2 Burr's Trial, 401.)

The Chief Justice accordingly recurred to the meaning of the term "*levying war*" in the statute of 25 Edw. III, c. 2, for the meaning of the same term in the Constitution of the United States and the Act of 1790.

In a similar manner, and upon a like principle, this Court, we submit, will recur for the meaning of the terms,—

"*has never given aid or comfort to the rebellion,*"—in the third section of the Act of March 12, 1863, to the previous legislation of Congress, in which the effective words of those terms are employed, as descriptive of a particular offense against the United States.

If the framers of the Constitution could be presumed to have intended to use the terms in their definition of treason according to the ascertained meaning of them in the statute of Edward III, there is a much stronger presumption, in the case of the Act of March 12, 1863, that Congress intended to use the words in that Act, now under consideration, in the meaning attached to them in its own previous legislation, in reference to giving of aid and comfort to the rebellion.

3. The Constitution declares that

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, *giving them aid and comfort.*"

The Act of April 30, 1790, provides:

"If any person owing allegiance to the United States shall levy war against the United States, or shall *adhere to their enemies, giving them aid and comfort,* within the United States, or elsewhere, and shall be convicted, &c., such person shall be adjudged guilty of treason against the United States, and shall suffer death."

The Act of July 17, 1862, "*to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes,*" provides:

"SEC. 1. That every person who shall hereafter commit the crime of treason against the United States, and shall be adjudged guilty thereof, shall suffer death, and all his slaves, if any, shall be declared and made free; or, at the discretion of the Court, he shall be imprisoned for not less than five years, and fined not less than ten thousand dollars, &c.

"SEC. 2. That if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection, against the authority of the United States, or the laws thereof, or shall *give aid or comfort thereto,* or shall engage in, or *give aid and comfort to any such existing rebellion,*

or insurrection, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, or by both of said punishments, at the discretion of the Court.

"SEC. 3. That every person guilty of either of the offenses described in this Act, shall be forever incapable and disqualified to hold any office under the United States.

"SEC. 4. That this Act shall not be construed in any way to affect or alter the prosecution, conviction, or punishment of any person guilty of treason against the United States before the passage of this Act, unless such a person is convicted under this Act."

The statute (sections 5 and 6) then proceeds to provide for the seizure and confiscation of the property of various classes of persons identified, by their disloyal acts, with the rebellion.

The Court has held, that the statute treated the persons who did the acts recited in the 5th and 6th sections as enemies, and their property as enemy's property, and in that character subjected their property to confiscation.

The 5th and 6th sections, as the 1st and 2d, apply, of course, only to persons who owed allegiance to the United States, and who, in aiding the rebellion, in the manner described, violated their duty of obedience and fidelity to the Government.

The construction and effect of the 1st and 2d sections of the Act of 1862, were the subject of careful consideration by Mr. Justice Field, presiding on the trial of *Greathouse and others*, indicted under the 2d section of that Act, for engaging in, and giving aid and comfort to the rebellion, by fitting out the privateer *Chapman*, at San Francisco, in 1863. The learned Judge held, that the purpose of the Act was to punish treason thereafter committed with death, or fine and imprisonment, unless the *treason* consisted in engaging in, or giving aid and comfort to, a *rebellion*, in which event the death penalty was to be abandoned, and a less penalty inflicted.

Mr. Justice Field said:

"The Constitution, as you have seen, declares that 'treason against the United States shall consist *only* in levying war, or in adhering to their enemies, giving them aid and comfort.' Rebels not being enemies within its meaning, an indictment alleging the giving of aid and comfort to them had been, as was stated, held defective.

"But if such ruling had been made, it was made, we presume, not because the giving of aid and comfort to rebels was not treason, but because the parties giving such aid and comfort were equally involved in guilt with those in open hostilities, and should have been indicted for levying war; for every species of aid and comfort, which, if given to a foreign enemy, would constitute treason within the second clause of the constitutional provision, adhering to the enemies of the United States, would, if given to the rebels in insurrection against the Government, constitute a levying of war under the first clause.

"Section two of the Act, however, relieves the subject from any difficulty, so far as the form of the indictment is concerned. It is not necessary now to use specifically the term 'levying war'; it will be sufficient if the indictment follows the language of the Act, as the indictment does in the present case. But we are unable to conceive of any Act designated in section two which would not constitute treason, except perhaps, as suggested by my associate, that of inciting to a rebellion. If we lay aside the discussion in the Senate, and read the several sections of the Act together, the apparent inconsistency disappears. Looking at the Act alone, we conclude that Congess intended—1st, to preserve the Act of 1790, which prescribes the penalty of death in force of the prosecution and punishment of offenses committed previous to July 17, 1862, unless the parties accused are convicted under the Act of the latter date for subsequent offenses; 2d, *to punish treason thereafter committed with death, or fine and imprisonment, in the discretion of the Court, unless the treason consist in engaging in or assisting a rebellion, or insurrection, against the authority of the United States, or the laws thereof*, in which event the death penalty is to be abandoned, and a less penalty inflicted.

"By this construction, the apparent inconsistency in the provisions of the different sections is avoided, and effect given to each clause of the Act. The defendants are, therefore, in fact, on trial for treason, and they have had all the protection and privileges allowed to parties accused of treason, without

being liable, in case of conviction, to the penalty which all other civilized nations have awarded to this, the highest of crimes known to the law." (2 Abbott's U. S. R., 376.)

4. The offense of *giving aid* or *comfort to the rebellion*, as described by the Act of 1862, is, therefore, specifically treason; and it would be committed only by those who owed allegiance, perpetual or temporary, to the Government of the United States.

There is nothing better settled in jurisprudence than that the essence of treason, (Tréson, Treubruch,) is betrayal (trahir) of allegiance; and, therefore, where no allegiance is due, the offense of treason, or of giving aid or comfort to the rebellion, cannot be committed. (4 Bl. Comm., 75; Carlisle's Case, 16 Wall., 155.)

Chief Justice Marshall, in *The United States* v. *Willberger*, (5 Wh., 97,) said:

"Treason is a breach of allegiance, and can be committed by him only who owes allegiance, either perpetual or temporary. The words, therefore, *'owing allegiance to the United States,'* in the 1st section of the Act of 1790, are entirely surplus words, which do not in the slightest degree affect its sense. The construction would be precisely the same were they omitted."

The Chief Justice, in *United States* v. *Palmer*, (3 Wh., 631,) also said that the words "*any person or persons*," used in the Act of 1790, in describing those who may commit misprision of treason, "are, *necessarily, confined to any person or persons owing permanent or temporary allegiance to the United States.*"

5. Congress having thus, but a short time before the passage of the Captured and Abandoned Property Act, expressly described and punished the *offense of giving aid and comfort to the rebellion*, it is reasonable and just to presume that it intended that the Act describing and punishing that offense should be resorted to for the purpose of defining the terms of the Captured and Abandoned Property Act, which with-

hold from those who gave "aid or comfort to the rebellion" the proceeds of their captured property.

It is scarcely conceivable that those terms, in the Act of March 12, 1863, were not employed in the sense in which they were used in the Act of July 17, 1862, and that Congress did not mean that it should be understood that those only whose acts constituted, when they were done, public offenses, under the Act of 1862, were affected with a disability to demand and receive the proceeds of captured property.

It is manifest that when the Act of 1863 provided that a claimant shall prove that he "never gave aid or comfort to the present rebellion," it meant that he should prove that he never committed the *public offense* of giving "aid or comfort to the rebellion," described in the Act of 1862. The words of the Act of 1863 are purely technical words,—as much so as the words "levying war" in the Constitution and the Act of 1790. They had a definite and ascertained meaning, in the legislation of the Government, at the date of the Act of 1863; and, nothing to the contrary appearing in the context, Congress must be understood as employing them in *that* meaning in the Act of March 12, 1863.

XVIII.

Mr. Collie Never Gave "Aid or Comfort to the Rebellion."

The claimant never having been subject to the jurisdiction of the United States, and never having been under the allegiance of the United States, could not, by any of his acts, during the civil war, give "aid or comfort to the rebellion," in the sense of the Act of July 17, 1862, and, therefore, he never gave "aid or comfort to the rebellion," in the meaning of the Captured and Abandoned Property Act of March 12, 1863.

1. The principle of construction already submitted, is, that no acts in aid of the rebellion which did not constitute

treason, by giving aid and comfort to the rebellion, within the Act of 1862, and which were, therefore, not crimes under our municipal law, can bar a recovery under the Captured Property Act of 1863.

This principle is applicable, of course, universally, in cases arising under the Captured Property Act. It solves all questions that can arise in cases of claims by citizens, or aliens resident in the territory of the United States, during the rebellion, as well as in cases of claims by neutrals, domiciled abroad, during the war, who never were personally in the territory of the United States.

The latter, *i. e., non-resident neutrals,* of course, owed no obedience, or allegiance, to the United States, and their acts, although they may have in fact afforded assistance to the Confederates, did not constitute treason, or "aid or comfort to the rebellion," within the Act of 1862, and, therefore, those acts were not "aid or comfort to the rebellion," within the meaning of the Captured Property Act of 1863.

Their acts, no matter what assistance they may have afforded the belligerents, were not *treasonable, criminal,* or *unlawful* under the municipal law of the United States.

To affirm that a person gave "aid or comfort to the rebellion," is to affirm that he did acts which were criminal offenses, and punishable as such under the Act of July 17, 1862. If, in fact, his acts in aid of the rebellion were not offenses punishable under that Act, they were not "aid or comfort to the rebellion." And the acts were, therefore, lawful acts, although they aided the rebellion. All acts in aid of the rebellion, which were punishable under the Act of 1862, were unlawful acts, and all acts in aid of the rebellion, which were not offenses against the Act of 1862, were lawful acts.

The acts of non-resident neutrals in aid of the Confederates were not offenses under the Act of 1862; and those acts were, therefore, lawful acts in the estimation of the municipal jurisprudence of the United States.

2. In contending, then, that *non-resident neutrals* are not

affected, under the Captured and Abandoned Property Act, by any assistance afforded the Confederates, we are simply claiming that they are not affected, under that Act, by acts which, in the estimation of the municipal law of the United States, were not unlawful, but, on the contrary, were lawful acts.

3. The general principle inculcated here applies in cases of claims by citizens, and by aliens owing allegiance to the United States.

It is settled, we suppose, as to citizens, and others in their situation, that their acts in aiding the rebellion must have been unlawful, as subject to punishment under the Act of 1862, in order to create a bar to the recovery of their captured property. This is the effect of all the decisions of this Court.

In *Padleford's Case*, (9 Wall., 538,) the Government claimed that a man who gave aid or comfort *involuntarily*, was barred, because, as was said, the disability attached to the act of aiding the rebellion, and the statute was not concerned with the crime.

But this Court rejected the sophism. (Page 542.) It held, in effect, that the disability attached to the *crime*, and that as there was no *crime* in aiding the rebellion, when the aid was *not* voluntarily rendered, involuntary aid or comfort was no bar to a recovery.

Mr. Justice Miller, in *Klein's Case*, speaks of the persons disabled as "those who had given *active support* to the rebellion." (13 Wall., 149.) But why the "active" supporters, unless the statute referred to those who became *criminals* in supporting the rebellion?

4. All the people of the insurgent States gave *de facto* aid and comfort to the rebellion. The farmer who tilled the soil, the mechanic who manufactured the implements of husbandry, the merchant who exchanged the products of labor, the citizen who employed the currency of the country, and obeyed the laws. Each contributed his share of

support to the rebellion. But it has never been argued, we believe, in this Court, that transactions in the ordinary course of civil society, although they furthered the ends of the insurrectionary movement, and thus aided the rebellion, constituted "aid and comfort to the rebellion," in the meaning of the Captured Property Act.

5. In the case of citizens, and aliens owing allegiance, it must be evident that such acts in aid of the rebellion, only, as were punishable as crimes, under the Act of July 17, 1862, constituted "aid or comfort to the rebellion," within the meaning of the Captured Property Act.

We have seen that aid or comfort not voluntarily given, is no bar; so if a citizen, under the allegiance, should have obtained a license from the President, under the Non-Intercourse Act of July 13, 1861, to take a cargo of arms to Charleston, in 1863, and sell them to the Confederate Government for cotton, and carried out the enterprise, to the letter, we suppose the transaction could not be set up against him as bar to the recovery of a portion of the cotton that he might have left behind him in Charleston. Without the protection of the license of the President, the transaction supposed would, of course, have been treason, by giving aid or comfort to the rebellion, within the Act of July 17, 1862, and, unless pardoned, would have barred a recovery under the Act of 1863. But, protected by the license, which, as to him, remitted the hostile character of the rebellion, the transaction was not treasonable, criminal, or unlawful, but was perfectly lawful, and it could not have been made the basis of an indictment under the Act of July 17, 1862, or a defense under the Captured Property Act.

6. If, then, acts in aid of the rebellion, which were lawful acts, would not defeat a claim, in the case of a citizen, or other person owing allegiance to the United States, why should acts, on the part of the subject of a neutral State, who never for one hour was under the allegiance of the United States, which were not criminal, or unlawful, on his

part, although they afforded material assistance to the Confederates, interfere with his right of recovery under the Captured Property Act?

The law deals with the legal and moral quality of acts.

The Captured Property Act meant to do so in the case of the owners of captured property.

The legal and moral quality of Mr. Collie's acts was that they were free from all treasonable, criminal, or unlawful traits, and all moral culpability or blame.

They were not offenses against the criminal laws of the United States.

They were not prohibited by any statute of the United States.

They were not acts which the United States could have lawfully prohibited under the public law, as was agreed when foreign nations protested against any attempt to interfere with their trade by a municipal interdict, independently of a blockade.

They were not acts which he was bound, by any legal or moral duty to the United States, to refrain from, or pretermit.

He had a right, under the public law, to carry on his intercourse and trade with the Confederate States, as much so as with the ports under the control of the National Government.

He had a right to carry on that trade under the municipal law of his own country, which never prohibited it, or interfered with it.

His acts, therefore, were not in violation of the law of the United States, or the law of nations, or the law of England.

7. Mr. Collie is, therefore, entitled to stand upon the same legal footing, under the Captured Property Act, with those citizens of the United States who never aided the rebellion, or with those citizens who in fact aided the rebellion, but whose acts in that regard were not unlawful under the laws of the United States.

XIX.

The Decisions of the Supreme Court in Cases Arising under the Act of March 12, 1863.

That the words of the third section of the Captured and Abandoned Property Act, under consideration, by their true construction, impose a disability to prosecute for the recovery of the proceeds of captured property, upon those *only* who committed the *criminal offense* of giving "aid or comfort" to the rebellion, is a proposition which, we respectfully submit, has been, in effect, adjudged by this Court by its decisions touching the operation and effect of the general and special pardons of the President in cases arising under the Act.

1. If any proposition upon the Captured and Abandoned Property Act ought to be regarded as now settled, it is, that Congress intended to withhold the proceeds of captured property from those who committed the *crime* of giving aid or comfort to the rebellion, and in consequence of and as *punishment* for such crime. The disability imposed upon such persons was intended, as this Court has adjudged, as a penal infliction upon them on account of their treasonable participation in the rebellion, which was remitted when the President pardoned the offense to which the statute annexed the disability. This is the doctrine of this Court in reference to the object and effect of the Captured and Abandoned Property Act; and it is an inevitable and necessary deduction that the disability was intended to be imposed upon those *only* who were guilty of a criminal offense against the laws of the United States prescribing punishment for treason and for giving aid and comfort to the rebellion.

If Congress *intended* to affect those only who were guilty of such an offense, then it is clear that the Act cannot be so construed or applied as to affect persons who, although they may have aided the rebellion in fact, were not amen-

able for their acts to the laws of the United States defining and punishing those offenses. When the *intention* of Congress, in this regard, has been once ascertained, it is conclusive and final, and the statute can be made to operate upon those only whom Congress intended to affect with the disability.

2. In *Padleford's Case*, (9 Wall., 537,) it was contended by the Government that the only question was whether the claimant had done any *acts* which aided or assisted the rebellion, and that any such acts would bar a recovery, whether or not they possessed the *legal and moral quality of treason.* Thus, it was contended that acts in aid of the rebellion, which were not voluntarily committed, constituted a bar.

It was argued as follows:

"The exclusion of the claimants from the Court of Claims, by reason of *acts* of disloyalty, is not in the nature of a *penalty*, which could be remitted by the Executive power of pardon and amnesty. The statutes in question are not *penal* statutes. *They do not purport to inflict a penalty, or punishment, for a crime.* The jurisdiction of the Court of Claims is purely statutory; and when Congress, in providing for claims growing out of the war, deems it just and proper to provide that such claims shall not be entertained by that Court, except by those who satisfy the Court by proof that they have had *no part or lot in the support or prosecution of* such rebellion, such a limitation cannot be removed by Executive action. The power of pardon and amnesty, under the Constitution, or under the Act of 1862, is merely to *relieve from the penalties of guilt.* Here the party claiming the benefit of the jurisdiction is required to prove affirmatively the fact that he never did certain *acts*; to prove it as an historical fact, not a constructive one."

The whole of this argument has been brushed away by this Court. The question, under its rulings, is not whether a claimant did any *acts* which aided the rebellion, but whether he committed the *crime* of aiding the rebellion.

The Court has construed the statute as a *penal fulmination* against those who were guilty of participation in the

treason of the rebellion. It has held that it seized upon the *rights of property* of such persons, and withheld them as a penalty or punishment for their *crimes.* It has decided that as the disability imposed upon such persons was intended to be annexed to the *crime* of giving aid or comfort to the rebellion, it was removed by the pardon of the offenders for their *crime* of participation in the rebellion. As a result of these decisions, as stated by Judge Nott, the supposed title of the Government to a fund in which its ultimate proprietary interest would have amounted to more than $20,000,000, was completely shattered. (Opinion of Nott, J., Rec., p. 43.)

The Chief Justice, in *Padleford's Case,* (9 Wall., 538, 543,) sketched out in brief terms the grand outline of the noble theory of the statute, which constitutes the foundation of the judgments of the Court. The proposition was adjudged that the acts must be voluntary, to constitute "aid or comfort" to the rebellion. As to the *pardon,* the Court said:

"At the time of the seizure of the petitioner's property he was *purged* of whatever *offense* against the laws of the United States he had committed by the *acts* mentioned in the findings, and relieved from any *penalty* he might have incurred.

"But it has been suggested that the property was captured in fact, if not lawfully; and that the proceeds having been paid into the Treasury, the petitioner is without remedy in the Court of Claims, unless proof is made that he gave no aid or comfort to the rebellion. *The suggestion is ingenuous, but we do not think it is sound.* The sufficient answer is that, after the pardon, no *offense* connected with the rebellion can be imputed to him. The law makes the proof of pardon a complete *substitute* for proof that he gave no *aid or comfort* to the rebellion."

In *Klein's Case,* (13 Wall., 150,) the Court declared unconstitutional an Act intended to deny to pardons the effect thus adjudged to them in cases under the statute. The Court, therefore, interpreted the disability as a *punitive or penal disability directly annexed to the offense pardoned,* and,

necessarily, the operation of the pardon for the offense upon this penalty could not be restrained, or affected, by any legislation of Congress.

It seems impossible to doubt that the Court held here that the disability arose out of the very *offense* embraced by the pardon, and nothing else, under the statute.

The disability being inflicted specifically as punishment for the *offense* committed, did not go, under the statute, to the jurisdiction of the Court, but went to the *penalty for the offense.*

The Court said:

"It is clear the Legislature cannot change the effect of such a pardon, any more than the Executive can change a law. Yet this is attempted by the provision under consideration. The Court is required to receive special pardons as evidence of the *guilt,* and to treat them as null and void."

In *Mrs. Armstrong's Case,* (13 Wall., 154,) and in *Pargoud's Case,* (Ib., 156,) the Court held, that after the proclamation of December 25, 1868, granting to every person who participated in the rebellion a full pardon for the offense of *treason* against the United States, proof that the claimant never gave "aid or comfort" to the rebellion, was dispensed with in every case.

It is impossible to understand the ground of this decision, unless the Court meant to be understood as adjudging, that the acts which constitute "aid or comfort" to the rebellion, within the meaning of the Act of March 12, 1863, are treason against the United States. A pardon for *treason* can be a complete substitute for proof that the pardoned claimant never gave "any aid or comfort to the rebellion," only upon the principle, that "aid or comfort" to the rebellion means *treason* in the Captured Property Act.

The Chief Justice, in *Armstrong's Case,* said:

"We have recently held, in the case of *U. S.* v. *Klein,* that pardon granted upon conditions *blots out the offense,* if proof is made of compliance with the conditions."

What is the *offense* thus blotted out? Can it be other than the *offense* of giving "aid or comfort" to the rebel-

lion? What, then, is "aid or comfort" to the rebellion, in the sense of the Act, but an offense against the United States? What offense is it? Plainly, in the estimation of these authorities, treason against the United States.

The judgment of the Court, pronounced by Mr. Justice Field, in *Carlisle's Case*, (16 Wall., 150–156,) appears to lead directly and inevitably to the conclusion that those only *who were amenable to the laws of the United States prescribing punishment for treason and for giving aid and comfort to the rebellion*, could give "aid or comfort" to the rebellion, in the sense of the Act of March 12, 1863, and that "aid or comfort" to the rebellion, in that Act, meant an *offense against those laws.*

The status of the claimants was that of aliens *domiciled in the country prior to the rebellion*, and, therefore, under the obligation of fidelity and obedience to the Government, who subsequently took their lot with the insurgents.

Let the reasoning of the Court, upon the question whether the claimants gave aid or comfort to the rebellion, be studied, and it will be clearly seen that the Court regarded that question, under the Act, simply as an inquiry whether the claimants committed *treason.*

Mr. Justice Field said:

"By thus furnishing materials for the prosecution of the war, *whilst they were domiciled in the country*, knowing the uses to which the materials were to be applied, the claimants became participators in the *treason of the Confederates equally as if they had been original conspirators with them.* The Court of Claims, *therefore*, did not *err* in its *conclusion* that the *act* of the claimants, in selling the saltpetre to the Confederates, *under these circumstances*, was an *act of aid and comfort to the rebellion.*"

Manifestly the course and character of the reasoning in the opinion, in this case of *Carlisle and Henderson*, justify the conclusion, that, if the claimants had not been domiciled aliens, and had, therefore, not been bound by allegiance to the United States, the Court would have held that

their act in selling the saltpetre to the Confederates was *not* an act of "aid or comfort" to the rebellion, in the meaning of the Act of March 12, 1863, because it was not treason against the United States.

The Court clearly seems to have thought it necessary to show that by their act of selling the saltpetre, the claimants, although aliens, became participators in the treason of the Confederates equally as if they had been original conspirators with them, in order to affirm the conclusion of the Court of Claims, that the act was "an act of aid and comfort to the rebellion." It was because their act in aid of the Confederates, by virtue of their domicil in the country prior to the rebellion, and their continued residence in the country, and their consequent allegiance to the Government, possessed the legal quality of treason against the United States, the Court held that the act in question constituted "aid or comfort" to the rebellion, and deprived them of the right to recover the proceeds of their cotton, but for the Proclamation of December 25, 1868.

The Court adjudged that it was the *legal quality* of their act as *treason* that constituted it aid or comfort to the rebellion.

Mr. Justice Field, after showing that the claimants, although aliens, owed a temporary allegiance to the United States while domiciled here, and might be *punished* for *treason*,* as native-born citizens, says:

"Such being the established doctrine, the claimants here were *amenable to the laws of the United States prescribing punishment for treason and for giving aid and comfort to the rebellion.* They were domiciled aliens in the country prior to the rebellion, under the obligation of fidelity and obedience to the Government. They subsequently took their lot with the insurgents, and would be subject *like them* to *punishment under the laws they violated*, but for the Proclamation of the President of December 28, 1868."

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* The learned Judge here cites Mr. Webster's report in the case of Thrasher, and italicizes the words, thus: "may be *punished for treason*, or other crimes, as a native-born subject might be."

The import of this declaration plainly is, that amenability to the criminal laws of the United States was indispensable to constitute acts in aid of the rebellion, "aid and comfort" to the rebellion under the Captured Property Act.

3. The plain and inevitable deduction from the whole opinion of the Court, in the case of *Carlisle and Henderson*, clearly is, that the provision of the Captured and Abandoned Property Act under consideration, was directed against those who violated their duty of allegiance to the Government, and became amenable to punishment as traitors under the criminal laws of the United States, and that acts in aid of the rebellion, which were punishable as offenses against the laws prescribing punishment for treason and giving aid and comfort to the rebellion, are *alone* acts of "aid or comfort" to the rebellion, within the meaning of that statute.

4. We are warranted in believing, if *Carlisle and Henderson* had never resided in the United States, and had never thus become affected with any political duty of allegiance to the Government, that this Court would have decided that their transactions with the Confederate authorities were not acts of aid or comfort to the rebellion within the meaning of the Act of March 12, 1863.

It was the fact and effect of their allegiance to the United States that alone determined the legal quality of their transactions, and brought them within the designation of acts of aid and comfort to the rebellion.

5. The question as to the character of the acts of aliens in connection with the rebellion, as "aid or comfort" or not, depends, therefore, we submit, under the judgment in *Carlisle* v. *The United States*, upon their political relations to the United States as resident, or non-resident, within the jurisdiction, and under the sovereignty and allegiance, of the Government. This is a juridical test which conforms the Act of March 12, 1863, to the principles of the public law of nations, the rules of natural justice, and the general doc-

trines of the municipal jurisprudence of the United States and other civilized nations. Applying that test to the present case, the proceeds now claimed must be restored to the claimant, who will receive, by the decree of the Court, nothing but what is his own.

6. Mr. Collie never owed any obedience, or allegiance, to the United States. His acts were not offenses against the United States, under their municipal law, and the Court cannot impute any criminality, or illegality, to his acts. As was said by Lord Stowell, in language approved by this Court, speaking by Chief Justice Marshall, a Court must look to the *legal* standard of morality, and, in the administration of law, cannot attribute criminality to an act where the *law* imputes none. (The Antelope, 10 Wheaton, 119.)

PART IV.

THE AMNESTY OF THE PRESIDENT.

I.

General Proposition of the Argument.

If the Court should not concur in the views presented in the foregoing argument, but should adjudge that the acts of the claimant were acts of "aid or comfort" to the rebellion, according to the true construction, and within the just meaning of the Act of March 12, 1863, and that, as a legal consequence of those acts, he is disabled, by the operation of that statute, from prosecuting a suit for the recovery of the proceeds of his property, unless relieved from such disability by the effect of the Proclamation of the President of December 25, 1868, we shall claim and maintain that Mr. Collie was, and is, entitled to the benefit of that Proclamation, and that, by its operation and effect, he is relieved and exonerated from any, and all, disability to recover the net proceeds of his property in the Treasury of the United States.

1. The questions involved in this general proposition are exhaustively discussed in a special argument by one of our learned associates, which will be presented to the Court.

It will be necessary, therefore, to submit here only the main outline of the argument on this branch of the case.

According to the argument in the foregoing pages, Mr. Collie's acts, not possessing the legal and moral *quality* of *crimes* against the United States, within the laws prescribing punishment for treason and for giving aid and comfort to the rebellion, were *not* acts of "aid or comfort" to the rebellion, within the meaning of the Act of March 12, 1863.

But we now submit, that if any acts in connection with

the rebellion, which were not crimes against those laws, may constitute "aid or comfort" to the rebellion, and if Mr. Collie's acts, though not crimes within those laws, should be deemed by the Court to constitute "aid or comfort" to the rebellion, within the meaning of the Act of March 12, 1863, and he is thus held to be affected with a disability and incapacity, by that statute, to prosecute a suit for the proceeds of his property,—in that case, we submit that Congress, by this legislation, assumed to take cognizance of his acts, and has imputed them to him, as offenses against the United States, and that the President had the authority to exercise in his favor the prerogative power of pardon, and relieve him from such specific penal consequence so annexed to his acts by this legislation, and that he exercised that power in and by his Proclamation of general amnesty of December 25, 1868.

2. This Court has never doubted that those who were not permitted to recover their property, under the Act of 1863, were intended to be punished by Congress, because of their acts of aid or comfort to the rebellion.

The Court has always regarded that Act, so far as it affected those who gave aid or comfort to the rebellion, in the light of a *penal fulmination* against them, on account of their acts of participation in the rebellion.

The proposition we submit is, that if Mr. Collie has no right, under the statute, to recover the proceeds of his property, Congress has assumed to annex, though in violation of all public law, a specific punishment, or penalty, to the acts done by him during the civil war, and has thereby deemed and treated them, and imputed them to him, as offenses against the United States.

3. If Congress has assumed to so treat Mr. Collie's act, the President had power to relieve him from the punishment, or penalty, and exonerate him from the diability, so assumed to be annexed to them by this legislation, upon the principle so often affirmed, that the power of the Presi-

dent to pardon is coextensive with the power of Congress to punish, and includes the remission of penalties and forfeitures, and the removal of disabilities annexed to the commission of offenses against the United States.

II.

The Extent of the Pardoning Power.

It was contended below, that the only acts which can be pardoned by the President are those which are expressly declared to be crimes by the statutes of the United States, and for which personal punishment, by criminal indictment against those who engaged in them, is provided by those statutes.

1. We apprehend this proposition is wholly untenable, and is opposed to a vast body of authorities on the subject of the pardoning power of the President.

In the case of *Armstrong's Foundry*, (6 Wall., 769,) a proceeding *in rem*, under the Act of August 6, 1861, to confiscate property purchased or acquired, sold or given, with intent to use, or suffer the same to be used, in aiding the insurrection, this Court held, that "the statute regarded the consent of the owner to the employment of his property in aid of the rebellion as an *offense*, and inflicted forfeiture as a *penalty*," and that "the general pardon of Armstrong relieved him of so much of the penalty as accrued to the United States."

The offense thus punished was nowhere defined as an indictable crime.

The Court has recently held, that a pardon was effective to restore property confiscated and sold by proceedings *in rem* under the 5th, 6th, and 7th sections of the Confiscation Act of July 17, 1862. (Osborne *v.* United States, 1 Otto, 477, 478.)

The Court, in that case, said: "The constitutional grant to the President of the power to pardon offenses must be held

to carry with it, as an incident, the power to release penalties and forfeitures which accrue from the offenses."

In *Ex parte Garland*, (4 Wall., 374, 381,) the Court said:

"Exclusion from any of the professions, or any of the ordinary avocations of life, for past conduct, can be regarded in no other light than as punishment for such conduct. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offense of treason committed by participation in the rebellion; so far as that offense is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offense, from continuing in the enjoyment of a previously-acquired right, is to enforce a punishment for that offense notwithstanding the pardon."

2. In numerous instances, the statutes ordain the forfeiture of property for acts which are not imputable as personal crimes, or offenses, to the owner, as well as for acts where there is no accompanying penalty *in personam*, or other punishment, prescribed against any one.

Many cases of such forfeitures occur under the revenue and navigation laws, the neutrality acts, embargo and non-intercourse laws, the acts against the slave trade, and those for the suppression of piratical aggressions.

The theory of such forfeitures *in rem* was expounded by Judge Story in the case of Brig *Malek Adhel*, (2 How., 232,) under the Act of 1819, with regard to piratical aggressions, as it had been previously in the case of *The Palmyra*, (12 Wh., 1,) under the same Act.

The statute enforced in those cases prescribed no personal punishment; and the objection that the innocence of the owner was a protection against the forfeiture of the property was twice overruled by this Court.

In the case of *The Palmyra*, the counsel contended, that a personal conviction of the offender was necessary to enforce a forfeiture *in rem*, under the Act of 1819, but the Court overruled the objection, and held that the property might be forfeited, although there was no act providing for the personal punishment of offenders who commit "any

piratical aggression, search, restraint, depredation, or seizure."

3. We suppose it is settled, that the President's power extends to the remission of forfeitures, in all such cases, whether the implicated property is owned by citizens or aliens, independently of any question as to the indictable character of the acts. (U. S. *v.* Wilson, 7 Pet., 160; *Ex parte* Wells, 18 How., 309; U. S. *v.* Lancaster, 4 W. C. C. R., 66; Opinions of Attorney-General Berrien, 2 Ops., 492; Clifford, 4 Ib., 575; Cushing, 6 Ib., 489; 8 Ib., 283; Stanbery, 12 Ib., 81; 2 Story on Constitution, sec. 1504 *and note.*)

III.

The Proclamation of December 25, 1868.

This celebrated and beneficent act of the Executive, after reciting that it was believed that a *universal* amnesty and pardon for participation in the rebellion extended to *all* who had borne *any* part therein, would tend to secure permanent peace, order, and prosperity throughout the land, granted "unconditionally and without reservation, to *all and to every person who, directly or indirectly, participated in the late insurrection or rebellion*, a full pardon and amnesty for the offense of treason against the United States, or of *adhering to their enemies during the late civil war*, with restoration of all *rights*, *privileges*, and *immunities* under the Constitution and the laws which have been made in pursuance thereof." (15 Stats. at Large, 712.)

1. The language of this Proclamation is essentially the same as that of the Proclamation of July 4, 1868, (15 Stats., 703,) which is the first of the series of Proclamations of pardon and amnesty containing the words, "*or of adhering to their enemies during the late civil war.*"

The Proclamation of July 4 was also the first that dis-

pensed with the taking of an oath of allegiance by the person desiring the benefits of the pardon.

2. If Congress, by the Act of March 12, 1863, assumed, contrary to the public law, to regard the acts of Mr. Collie, or any of them, in the course of his intercourse and commerce with the Confederates States as offenses against the United States, by depriving him, because of those acts, or any of them, of the benefits intended to be given by that statute, we then maintain that the offense thus imputed to him by the statute comes within the designation of the offense of "*adhering to the enemies of the United States during the late civil war*," in the President's Proclamation. Mr. Collie's acts did not constitute treason, or the crime of giving aid or comfort to the rebellion, within the Act of July 17, 1862, and, therefore, as we have maintained, they did not constitute "aid or comfort" to the rebellion within the meaning of the Act of 1863. But if the Court should hold that Congress intended to include the acts of neutral subjects which afforded assistance to the enemy, within the designation of acts of "aid or comfort" to the rebellion, Congress has treated such acts as an offense, which is appropriately described in the Proclamation as "adhering to the enemies of the United States."

The words are not fit and apt words to describe the acts of citizens of the United States, or aliens within the allegiance of the United States, who engaged in armed rebellion or rendered assistance to the rebels in arms; and, besides, their offenses come within the other specific designation of treason against the United States.

It is impossible to find any application for these words, unless they refer to the acts of the subjects or citizens of neutral States, under the allegiance of their own Sovereigns, who engaged in transactions which rendered assistance to the enemies of the United States, and who may thus be said to have adhered to those enemies in the civil war. And if, by the true construction of the Act of March 12, 1863, as this Court shall determine it, such neutral subjects were

affected with any disability in respect to the recovery of the proceeds of their property captured under that statute, such disability, we submit, was removed, and they were restored to all their rights in such captured property, by the effect of the Proclamation of the President.

In conclusion, we ask that the trust declared by the Act of Congress be now executed by the decree of the Court of Claims.

The Government has had, for twelve years, the use of the fund, which has realized an amount of interest nearly equal to the principal.

The law and justice alike require that the principal be surrendered, without interest, to the estate of the original petitioner.

J. HUBLEY ASHTON,
Of Counsel.

EXPORT OF ARMS AND OTHER MILITARY SUPPLIES

FROM

THE UNITED STATES

DURING

FRANCO-GERMAN WAR AND TURCO-RUSSIAN WAR.

FRANCO-GERMAN WAR.

Correspondence between Sir Edward Thornton and Earl Granville, British Parliamentary Papers, (Blue Book,) Franco-German War, No. 1 (1871).

[No. 183.]

SIR E. THORNTON TO EARL GRANVILLE.

[Received October 9.]

WASHINGTON, *September* 26, 1870.

MY LORD: With reference to my telegram of the 22d instant, in which I reported to your Lordship the shipment of arms and ammunition for France on board the French steamer *Lafayette*, which left New York on the 20th inst., I have the honor to inform you, that it has been generally said by the newspapers, and even Mr. Fish told me, that there were a much larger number of arms than I have mentioned in that telegram, besides some cannon. From the source, however, whence I obtained the information, I am inclined to think that my report is correct—(*i. e.*, 6,000 rifles, 3,000,000 cartridges).

The *Lafayette* also took between 500 and 600 Frenchmen, who, it was generally supposed, were about to join the French army; but there seems to be no proof that they had been enlisted in the United States, or that they were anything more than volunteers, who were going as passengers

of their own free will, and without any engagement. It seems, however, that Mr. Roesing, the North German Consul-General, made a representation to the authorities with a view to the *Lafayette's* being prevented from leaving the port, and although this step was unsuccessful, they were induced to go on board and select eighty-six Frenchmen from among the passengers and arrest them. These were not provided with tickets, but as nothing else could be proved against them they were immediately discharged, though not in time to regain the steamer, which had started with their luggage on board.

The District-Attorney had previously telegraphed to Mr. Fish for instructions, and Mr. Roesing to my Prussian colleague, urging that orders should be sent for the detention of the *Lafayette*. Mr. Fish replied to the District-Attorney, that he was to be guided by the neutrality laws of the United States, and that with regard to the ship it could not be alleged that she was intended for hostile purposes against North Germany. As for the arms and ammunition, they were articles of a legitimate commerce, with which the United States could not interfere, although the vessel might run the risk of being detained by the cruisers of North Germany, on her voyage to France. Baron Gerolt also called upon Mr. Fish, and earnestly urged him to order the detention of the *Lafayette;* but I understand that he received a similar answer to that which had previously been given to the District-Attorney.

Mr. Roesing asserts that he will make it clear to the authorities that the men who were arrested on board the *Lafayette* had actually been enlisted at New York; but he has not as yet been able to do so, and he is threatened with an action for damages by the men who were detained.

I have, &c.,

(Signed) EDWARD THORNTON.

[No. 221.]

SIR E. THORNTON TO EARL GRANVILLE.

[Extract.]

WASHINGTON, D. C., *October* 10, 1870.

With reference to my telegram of the 8th instant, I have the honor to inform your Lordship that the French merchant-steamer *Ville de Paris* left New York on the 4th in-

stant for Havre, without any interference from the United States authorities, having as a cargo about 90,000 Remington, Springfield, Enfield, and Spencer rifles and carbines.

Besides these arms, the *Ville de Paris* took about 8,000,000 cartridges.

There were also as passengers about 600 Frenchmen, who, it is not doubted, intend to join the French army.

The ship was completely full, and was unable to take 3,000 more arms which were to have been sent by her.

Applications have been made to some of the English lines of steamers to take arms either direct to France or to England for transhipment, but as yet these lines have thought it more prudent to refuse such freight.

[No. 274.]

SIR E. THORNTON TO EARL GRANVILLE.

[Received November 6.]

WASHINGTON, *October* 24, 1870.

MY LORD: In my telegram of the 22d instant, I had the honor to transmit to your Lordship a statement of the arms and ammunition taken by the French steamer *St. Laurent*, which left New York for Havre on the 20th inst. I added that many of these had been purchased from the arsenals of the United States. Of this there can be no doubt; indeed, it is notorious. A great number of the arms have been brought in barges directly from the arsenals at Governor's Island and the navy-yard at Brooklyn, and transferred to the French steamers. The payments for arms for the French Government are made through their consul at New York. I inclose an extract from the *New York Tribune* of the 19th instant, stating the bids which had been presented to the Ordnance Department for arms which the Government had offered to sell. The article states that an additional number of arms will be offered on the 29th instant. The Government consider themselves not bound to ascertain whether these arms are purchased for the use of either of the belligerents—Prussia or France. It cannot be doubted, however, that the circumstance of the war between those two powers has instigated the choice of this particular moment for offering arms for sale; the Government being desirous of getting rid, to the best advantage, of the useless arms remaining from the late war, and of continuing in

activity their armory at Springfield, in Massachusetts, at as little expense as possible.

In my despatch of the 17th instant, I stated that M. Seance, who was to be sent to New York to superintend shipments of munitions of war, was soon expected there. It now seems that the French Government have abandoned this intention, and have commissioned the Remington Arms Company to make the necessary purchases.

I have, &c.,

(Signed) EDWARD THORNTON.

P. S.—October 25.—I also inclose three printed copies of an announcement made by the Ordnance Department, in this morning's newspaper, that sealed tenders for the arms and ammunition therein mentioned will be received until the 29th instant. E. T.

[Inclosure 1 in No. 274.]

Extract from the New York Tribune of October 19, 1870.

BIDS FOR GOVERNMENT FIRE-ARMS.

WASHINGTON, *October* 18, 1870.

General Dyer, Chief of the Ordnance Bureau, to-day opened the bids for 200,000 Springfield rifled-muskets, new, and 110,000 old, but serviceable; also, 40,000 new Enfield rifles; 40,000 serviceable and 30,000 arms unserviceable. The following are the bids:

Charles Wright, New York, for 200,000 new Springfield, $15.25 per gun; 110,000 old, $7.25; for necessary quantity of ammunition, $14 per 1,000 cartridges.

Austin, Baldwin & Co., New York, 40,000, $12.30; 110,000 old, $9.30; 25,000,000 cartridges, $16.30 per 1,000. This bid to stand good for the whole or any portion of the Springfield muskets, provided there are to each 150 rounds of ammunition.

J. B. Hussey, New York, 50,000 Springfield, new, $6.45; 30,000 old, at $4.60; 30,000 new Enfield rifles, at $5 each, and 20,000 second-class, at $4 each.

Messrs. Herman, Baker & Co., New York, 50,000 Springfield rifles, new, at $12.10; 20,000 old, at $8.75, and 25,000,000 cartridges, at $15.25 per 1,000.

Messrs. Remington & Sons, Ilion, New York, 250,000 Springfield rifles, whether the same are clean, repaired, or

new, at $9.05 each, and cartridges in connection with them, at $14.05 per 1,000. This bid to be taken as a whole.

Mr. James C. Hays, New York, 50,000 Enfield rifles, at $4.75, and 40,000 second-class, at $3.50 each.

Messrs. Schuyler, Hartley & Graham, New York, 100,000 Springfield, new, at $12.05; 100,000 old, at $8.50; 10,000 Enfield, second-class, $4.26; 30,000,000 cartridges, at $15.20 per 1,000.

Gen. W. B. Franklin, for the Colt Arms Company, Hartford, $7.75 for all the new Enfields.

Caleb Hughes, New York, 14,000 new Springfields, at $10.75; 2,800,000 cartridges, at $12.50 per 1,000.

Horace E. Brown, 60,000 new Enfields, at $6.10; 40,000 second-class, at $4.60.

A. B. Steinberger, 70,000 Springfields, old, $8.50; 40,000 Enfields, new, $7.40, and 30,000 Enfields, second-class, $5.35; 40,000,000 cartridges, at $14 per 1,000.

The Department reserves the right to reject any or all of the bids, if they fall below the appraised prices. A list of the offers has been made out, and will be acted upon in a few days. An additional number of arms will be offered on the 29th instant.

[Inclosure 3 in No. 274.]

Extract from the Washington Daily Republican of October 25, 1870.

PROPOSALS FOR THE SALE OF ORDNANCE AND ORDNANCE STORES.

ORDNANCE OFFICE, WAR DEPARTMENT,
WASHINGTON, D. C., *October* 17, 1870.

Sealed proposals will be received at this office until two o'clock P. M. on Saturday, the 29th day of October, 1870, for the purchase of the following ordnance and ordnance stores, viz.:

2,500 breech-loading muskets, calibre 58, with cartridge for the same.

1,000 Ball's repeating carbines, calibre 50, with ammunition.

2,500 Gallagher's carbines, adapted for Spencer ammunition.

4,000 Maynard's carbines, with 500 rounds of ammunition per gun.

1,000 Palmer's carbines, calibre 44, with ammunition.

3,600 Remington carbines, calibre 44, with ammunition.
2,500 Warner's carbines and ammunition.
2,700 Joslyn's carbines and ammunition, calibre 52.
40,000 sets carbine accoutrements, serviceable, Blakesly's and other patterns.
70,000 sets infantry accoutrements.
20,000 Starr's revolvers, calibre 44, with ammunition.
5,000 Rogers and Spencer's revolvers, calibre 44, with ammunition.
10,000 Remington army revolvers, calibre 44, with ammunition.
35,000 pistol holsters.
40,000 cavalry sabres.
1,000 Spencer rifles.
20,000 sets horse equipments.

Field artillery—

50 batteries of field artillery, complete, with ammunition.

Bids will be entertained for any one or all of the foregoing lots, the bids to specify the price offered for the arms with ammunition; for accoutrements, by themselves. The bids for artillery will be for batteries complete, with ammunition; so much for a battery of light 12-pounders, and so much for a battery of Parrot 3-inch guns, or for batteries and ammunition separately.

The privilege is reserved by this office of rejecting any one or all bids which may not be deemed sufficient or satisfactory. A margin of 20 per cent. must be paid at the time of the award, and the residue upon delivery at the stores. All the stores to be delivered at the city of New York within thirty days after the award.

(Signed) A. B. DYER,
Chief of Ordnance.

[No. 313.]

SIR E. THORNTON TO EARL GRANVILLE.

(Received December 19.)

WASHINGTON, *December* 3, 1870.

MY LORD: I have the honor to inform your Lordship that the American steamer *Erie*, of 2,900 tons, left New York for Cowes on the 29th ultimo, carrying the following

arms and ammunition for the French Government: 120,800 muskets, 1,760 carbines, 21,356 cases of cartridges.

The French steamer *Ville de Paris* left New York for Havre on the 1st instant, with the following contraband of war, also for the French Government: 17,600 muskets, 28,320 rifles, 5,200 carbines, 10,267 cases of cartridges, 25 cases of harness.

It is reported that on these large shipments of contraband of war for France being brought to the attention of the North German Consul-General, he stated, in reply, that he had been instructed by his Government not to concern himself about them, because there was no international law which forbade its export from a neutral country, though destined for a belligerent.

I have not deemed it necessary to incur the expense of reporting to your Lordship by telegraph the sailing of these two vessels, with contraband of war, because its free export, to a very large extent, is now an acknowledged fact, and has not been in any way interfered with by the authorities of the United States.

I have, &c.,

(Signed) EDWARD THORNTON.

[Inclosure 1 in No. 10.]

MR. FISH TO BARON GEROLT.

DEPARTMENT OF STATE,
WASHINGTON, *July* 22, 1870.

SIR: I have the honor to acknowledge the receipt of your letter of the 10th instant, communicating to this Government the text of a dispatch from Count Bismarck, to the effect that private property on the high seas will be exempt from seizure by the ships of His Majesty, the King of Prussia, without regard to reciprocity. In compliance with the request further contained in your note, that communication has been officially made public from this Department. It is now nearly a century since the United States, through Thomas Jefferson, Benjamin Franklin, and John Adams, their Plenipotentiaries, and Prussia, under the guidance of the Great Frederick, entered into a Treaty of Amity and Commerce, to be in force for ten years from its date, whereby it was agreed, that if war should unhappily arise between the two contracting parties, all merchant and trading ves-

sels employed in exchanging the products of different places, and thereby rendering the necessaries, conveniences, and comforts of human life more easy to be obtained and more general, should be allowed to pass free and unmolested, and that neither of the contracting Powers should grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels, or interrupt such commerce. The Government of the United States receives, with great pleasure, this renewed adherence of the great and enlightened German Government to the principles temporarily established by the treaty of 1785, and since then advocated by this Government whenever an opportunity has offered.

In 1854, President Pierce, in his Annual Message to Congress, said: "Should the leading Powers of Europe concur in proposing, as a rule of international law, to exempt private property upon the ocean from seizure by public armed cruisers, as well as by privateers, the United States will readily admit them on that broad ground."

In 1856, this Government was invited to give its adhesion to the Declaration of Paris. Mr. Marcy, then Secretary of State, replied: "The President proposes to add to the first proposition in the Declaration of the Congress at Paris the following words: 'and that the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, unless it be contraband.' Thus amended, the Government of the United States will adopt it, together with the other three principles contained in that Declaration." And again, in 1861, Mr. Seward renewed the offer to give the adhesion of the United States to the Declaration of the Congress of Paris, and expressed a preference that the same amendment should be retained. Count Bismarck's despatch, communicated in your letter of the 10th instant, shows that North Germany is willing to recognize this principle, even without reciprocity, in the war which has now unhappily broken out between that country and France. This gives reason to hope that the Government and the people of the United States may soon be gratified by seeing it universally recognized as another restraining and humanizing influence imposed by modern civilization upon the art of war.

Accept, &c.,

(Signed) HAMILTON FISH.

[No. 10.]

MR. THORNTON TO EARL GRANVILLE.

Received August 15. (Extract.)

NEWBURYPORT, *July* 30, 1870.

I had the honor to inform your Lordship that my Prussian colleague, Baron Gerolt, has announced to Mr. Fish the intention of his Government, during the impending war between France and North Germany, to respect private property on the high seas, without regard to reciprocity.

I now inclose a printed copy of a note addressed by Mr. Fish to Baron Gerolt, in reply to the announcement made by the latter, and of Baron Gerolt's answer. Mr. Fish, in his note, enlarges upon the support which has always been given by the United States to the principle of respect for private property on the high seas during war, and Baron Gerolt expresses his hope that the Government of the United States will use their position and influence to insure the universal acknowledgment of the above principle.

TURCO-RUSSIAN WAR.

[Extract from "Commerce and Navigation, 1876–'77," pages 246 and 302, respectively.]

EXPORT OF WAR MATERIAL, 1877.

ARTICLES.	COUNTRIES EXPORTED TO.	
	Russia.	Turkey.
Guns	$73,000	$4,272,877
Cartridges	275,094	1,580,333
Gunpowder	155,940	None.
Shot and shells	None.	2,160,000

FIRE-ARMS AND WAR MATERIAL SHIPPED FROM THE DIFFERENT PORTS IN 1877.

	From New Haven.	From New York.
Guns	$2,976,777	$2,216,722
Shot and shells	2,160,000	1,569
Cartridges	1,580,333	674,955
Gunpowder	187,853	.....

Compiled from official sources.

J. S. MOORE,
Official Statistician.

NEW YORK, *Feb.* 19, 1878.

U. S. SUPREME COURT.

No. 781.

JOHN YOUNG, Trustee in Bankruptcy
of Alexander Collie,
Appellant,

vs.

THE UNITED STATES.

NOTES OF ARGUMENT
FOR THE APPELLANT,

BY

W. W. MACFARLAND.

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Appellant,

vs.

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NOTES OF ARGUMENT.

Alexander Collie, a subject of Great Britain, and residing in London, carried on for a considerable period, during the late rebellion, an extensive trade with the people of the Confederate States. As the result of this traffic, he became the owner of the cotton in question, which was found stored at Savannah on the capture of that place by Gen. Sherman, and, together with all other cotton found there, was seized by the agents of the Government, sold, and the proceeds paid into the treasury.

It is found that in the year 1862 he engaged in fitting out and lading steamships to run the block-

ade of the ports of the States then in rebellion, and continued in that business for about two years, sending out a large number of vessels, many of which succeeded in running the blockade, in and out, carrying into these ports general merchandise, which was sold there, and also munitions of war, arms, gunpowder, armor-plates for war vessels, clothing, cannon, shot, ammunition, and quartermaster and medical stores purchased by him in England, or purchased there by agents of the Confederate States, to whom Collie made advances; that the munitions of war so shipped and arriving at blockaded ports were delivered to the Government of the Confederate States; that his vessels engaged in running the blockade took as return cargoes large quantities of cotton, received in part from the Confederate Government, in payment for munitions of war and other things, and in part consisting of cotton bought for him by his agents with the proceeds of his cargoes of general merchandise. Referring to his adventures of the latter character, the Court of Claims say: "The cotton for the recovery of the proceeds of which this suit was brought, was purchased by said Collie's agent in the said Confederate States with money so derived;" that is to say, from the proceeds of his sales of general merchandise. This particular finding will call for observation later.

It is also found that under date of October 1, 1863, Mr. Collie addressed a letter to John White, Special Commissioner for the State of North Carolina, in which, referring to the wants of the State, he proposes to furnish four steamers suitable for blockade running, to give to the State, when required, the entire inward carrying power of the steamers, one-

fourth of the space of the outward carrying power, and so forth. The arrangement here suggested was subsequently embodied in a contract, which is also set out in the findings. The State of North Carolina was to pay its share of the cost and outfit of the steamers in cotton warrants, and provision is made for sharing other expenses in certain proportions. The chief objects sought to be attained by the arrangement are declared to be:

"(1.) To supply railway iron, rolling stock, and such other articles as may be needed by the State, at a moderate rate of freight and in regular quantities.

"(2.) To run out regularly a quantity of cotton for the State, to enable it to benefit from the very high prices ruling here (England).

"(3.) To reduce the risk of capture as much as possible by dividing the interest of the Government over four or more steamers." * * *

It is further found that, in pursuance of this agreement, Mr. Collie sent out to Wilmington steamers loaded with shoes, army clothing, and other supplies which he had bought for account of the State of North Carolina, and that he received back cotton in payment, as well for the goods sent as for the shares of the State in the steamers; that he also, in the year 1863, sold for the State of North Carolina a large quantity of cotton warrants, which were obligations for the delivery of cotton at the port of Wilmington.

On the 13th of June, 1864, Mr. Collie entered into a contract with Mr. Colin J. McRae, agent of the Government of the Confederate States, and this contract is set out in the findings. This agreement provides, among other things, that Mr. Collie shall

furnish four large, powerful, new steamers; that he will cause to be purchased, under Mr. McRae's direction, quartermaster's stores to the value of £150,000 sterling, and ordnance or medical stores to the value of £50,000 sterling; the delivery of such purchases to extend over a period of about six months, shipment to be made to the Confederate States with as little delay as practicable. The goods on arrival are to be immediately taken by the Government at 50 per cent. advance on the English invoice, and M. Collie, through his agent, is to receive in exchange cotton at the rate of 6d. sterling per pound The remaining details of the agreement are not needful to show its general character.

In respect to this contract, the Court finds that, "in the winter of 1863–4, and the spring and summer of 1864, divers steamers were supplied, and importations of supplies and munitions of war for the Confederate Government were run by them into Wilmington, and return cargoes of cotton on account of that Government, and of Collie, were run by them out of that port to England;" that in March, 1864, Collie sent as a present to the Confederate States at Wilmington, on one of his steamers engaged in running the blockade of that port, a Whitworth gun for field service, with its proper equipment. The gun was received and used by the Confederates in defense of the port.

In the year 1864 Collie also sent, by one of his blockade-running vessels, to the Confederate Government as a gift, two Whitworth guns, which were received by that government and used in its service. During the same year he made a donation of $30,000 to aid the needy and suffering in the insurgent States.

Mr. Collie having become bankrupt, his assignee, the appellant, was duly substituted as the claimant in the case by an order of the Court of Claims made on the 24th of April, 1877 (p. 12).

Upon these facts the Court of Claims held, as a conclusion of law, that the petition of the claimant should be dismissed. Each of the learned Judges delivered an opinion, and each placed his decision on different grounds.

It was made to appear to this Court, when this case was before it on a former occasion, that this claim having been submitted to the Mixed Commission organized under the Treaty of Washington, on all the facts presented by this record, was rejected by that commission on the express ground that the claimant had a judicial remedy in the Court of Claims, that he had invoked that remedy, and that his case, therefore, was not one proper to to be brought before the commission under the treaty.

This circumstance is also referred to in the opinions of the Judges of the Court of Claims.

The errors complained of and assigned by the appellant, are that the Court of Claims mistook the law: (1) in deciding that the acts in the premises found by the Court to have been done and committed by Mr. Collie, constituted giving "aid and comfort" to the rebellion, within the meaning of the Captured and Abandoned Property Act, and therefore created a bar to his recovery; (2) in dismissing his petition.

1. The first question which this case presents is, what right the Government acquired in this cotton, the property of Mr. Collie, by the act of seizure and appropriation.

The Government by that act did not intend to assert a proprietary interest and work a confiscation *de facto*. The Government assumed and exercised a qualified right of possession, constituting itself a custodian, without title, of the cotton and its proceeds, and came under an obligation to restore the proceeds to the owner upon his making application in due form to the proper tribunal, and establishing his title and the personal status prescribed by statute.

This proposition has been settled and confirmed by many decisions of this Court.

"Except to property used in actual hostility, as mentioned in the first section of the Act of March 12, 1863, *no titles were divested in the insurgent States unless in pursuance of a judgment rendered after due legal proceedings.* The Government recognized to the fullest extent the humane maxims of the modern law of nations, which exempt private property of non-combatant enemies from capture as booty of war. Even the law of confiscation was sparingly applied. The cases were few indeed in which the property of any not engaged in actual hostility was subjected to seizure and sale."

Klein's Case, 13 Wal., 137.

Actual seizure under the Captured and Abandoned Property Act did not divest the title of the owner, but the Government constituted itself the trustee for those who were by that

Act declared entitled to the proceeds, and for those whom it should thereafter recognize as so entitled.

Padelford's Case, 9 Wal., 537.
Klein's Case, 13 Wal., 138, 139.

In the subsequent case of Haycraft *vs.* The United States, 22 Wal., 81, the Chief Justice reviews the previous cases on this subject, and makes a lucid exposition of the doctrine established by the Court which is again confirmed by the decision; and in the case of Lamar, Executor, *v.* Brown, 92 U. S., 196, the Chief Justice, in delivering the opinion of the Court, makes use of the following language:

"Military forces act in the field according to the laws of war, and seize that which is apparently the subject of capture. They act upon appearances and not upon testimony. They occupy on land the same position that naval forces do at sea. Their duty is to seize and hold, leaving it to the owners to make good their claim as against the capture in the appropriate tribunal established for that purpose."

This interpretation of the Statute renders it unnecessary to consider whether or not, consistently with the received rules of law applicable to such cases, the Government might have confiscated the property in the exercise of sovereign or belligerent rights. It is enough that it did not do so, and, as the Court say in Klein's case, could not have done so without due judicial proceedings for that purpose.

2. The Captured and Abandoned Property Act conferred upon the Court of Claims jurisdiction to entertain suits by the owners of the property which Government had so taken into its possession for the recovery of the proceeds, but in order to recover, the Government, among other things, thought proper to require the claimant to prove that he had never given *aid or comfort to the rebellion.*

The sole question in this case is whether, *in legal intendment,* the claimant has established *that fact.* The rule adopted by this Court for the construction of this Statute is that "it is remedial in its nature, requiring such a liberal construction as will give effect to the beneficent intention of Congress." The question then is, what acts on the part of a claimant amount to giving *aid and comfort,* and therefore constitute a bar to a recovery? On this question the opinions of the judges of the Court of Claims are discordant. All the judges, however, distinctly repudiate the principles of public law as rules or guides for decision, declaring that the jurisdiction of the Court, rests exclusively on the Statute, and that the Statute prescribes the rule of decision. They agree, in the language of Judge Nott, that "*the case is in the same plight as when it was first tried—the defendants have gained no legal point by the new trial.*" The Court simply reversed its former decision on the same facts, that is, facts of the same legal import—each of the judges writing opinions and placing their opinions on different grounds; Judge Nott holding that, "Whether a foreign neutral sold goods, contra-

"band or not contraband, to a belligerent, his "traffic was legal at public law, and his act, aid "or comfort to the insurgents, as a *matter of fact.* "The sending of cannon through the blockade "was no more an offense against our municipal "law or the public law than the sending of bread, "and whatever difference there may be is one of "degree and not of kind. The giving of cannon "to the Confederate cause was a mere incident of "his commercial transactions. * * * Neither "the magnitude of the sale, nor the nature of "the thing sold, nor the motive of the giver, can "make this intercourse a crime. Nor can I agree "that any act which is not an ofiense against the "municipal law of the United States will impose "upon the claimant a disability to prosecute his "suit in this Court for the proceeds of his cap- "tured property. * * * *I cannot approve of* "*any such duplicity of construction as would attach* "*the consequences of crime to acts wherein no crime* "*existed.*"

Referring to Sprott's case and Whitfield's case, the learned Judge holds that the present case is governed by these cases, and says: *"I place my decision upon this ground of improperly acquired title."* But the learned Judge had already demonstrated by forcible and logical reasoning, that there could he no vice in this title, *because the traffic in which it was acquired was perfectly lawful.*

Judge Richardson, while considering that the traffic of Collie was lawful, and constituted no offense against public law or the municipal law of this country, denies that there is any distinction "between the act and the crime."

In his opinion, the words "aid and comfort," when applied to persons owing a qualified or absolute allegiance, intend treasonable acts, but when applied to non-resident aliens, and neutrals, another meaning must be assigned to them; that as to *such persons*, they mean doing any lawful act the natural effect of which would be to aid and comfort the insurgents; that any act done under the sanction of public law, and not in violation of municipal law, the effect of which would be to give aid and comfort, constitutes a bar, *without constituting a crime or an offence of any kind or degree.* And then he says, in substance: *because such acts are not unlawful, but lawful, they cannot be reached by pardon or amnesty, and therefore they constitute a bar.*

The conclusion is, that the state and condition before the law of a red-handed traitor is far preferable to that of an unoffending neutral, the former being entitled to full restitution, because he was a criminal and a traitor, and, therefore, the subject of pardon; the other being remediless because he had offended no law, and not having offended could not be pardoned. Referring to Carlisle's case, he says: "The implication is strong and clear, that if the acts of aid and comfort given in their case had been held not to constitute offenses by reason of the alienage of the claimants, judgment would have been rendered against them." * * * Here is certainly a *reductio ad absurdum* of the finest type.

There must be something wrong with such an argument. The mind refuses assent to it as being repugnant to right, reason, and good

morals. It affords a striking illustration of the maxim, "*Qui hæret in litera, hæret in cortice.*"

A Bolognian law, mentioned by Puffendorf and Blackstone, enacted that whoever drew blood in the street should be punished with the utmost severity; but it was held, after a long debate, not to extend to the surgeon who opened the vein of a person that fell down in the street with a fit. The act was within the express words of the statute, and according to the reasoning of the learned Judge above quoted the surgeon would have incurred its penalty. But the Judges said no; it would be absurd and wicked to punish a lawful act. It was the letting of blood unlawfully that the statute contemplated. The learned Chief Justice declares that if the Court of Claims was at liberty to base its decision upon the principles of public law, it would be difficult to resist the force of the argument in favor of the claimant.

"But," he says, "in any view I can take of the matter, the Court is not authorized to base its decision for or against either party on these principles and rules." The former decision of that Court in favor of the claimant, in which the Chief Justice concurred, was based on these principles and rules, and the learned Judge overlooked the universally received proposition that public law is a part of the municipal law of every civilized State, constituting as such a rule of decision.

Seton *v.* Low, 1 Joh. Ca., 1

Municipal enactments will never be construed

to conflict with public law if such a construction can be avoided.

Talbot *v.* Seaman, 1 Cranch, 1.

Murray *v. Charming Betsey*, 2 Cranch, 64, 118.

It is a grave error, therefore, on the part of the learned Judge to suppose that Congress intended to prescribe rules of decision for the Court, and to eliminate public law from the rules prescribed. The learned Judge states the grounds of his decision in substance as follows:

The terms of the Act exclude Mr. Collie, as they did all persons who had *in fact* given aid and comfort to the rebellion, until the Supreme Court decided that pardon and amnesty obliterated the act and guilt. But pardon and amnesty cannot apply to him who has incurred *no guilt.* Collie committed no offense, was guilty of no crime; "*the worst that could befall him was the capture in transitu of those munitions.*" Therefore, his acts not constituting an offense, cannot be pardoned; and being innocent acts in the eye of the law, they constitute a perpetual bar to the recovery of his property, unless his Government thinks proper to make reclamation in his behalf, in which case it seems to be conceded that he would be entitled to the full value of his cotton.

But he sought redress before the international tribunal known as the Mixed Commission, constituted expressly for the adjustment of all claims growing out of the war that could not be dealt with by the judicial tribunals. He was dismissed because the Government insisted

that the Court of Claims, where he was prosecuting his suit, could give him a just measure of relief.

3. The fundamental idea which underlies the decision of the Court of Claims, and which is greatly elaborated, is that Congress of its mere grace and favor thought proper to grant a remedy where none was due, and that claimants desiring to avail of this free grace must bring themselves within the letter of this Act, construed with Draconian severity against them. We have already seen that such is not the view of the statute entertained by this Court; that on the other hand, it is to be regarded as a remedial statute, to be construed with liberality, and so as to carry out the beneficent intent which the Court declares the Government had in view. Moreover, the opposite argument takes little account of the honor of the Government. The Government possessed itself of this property, not as proprietor, not as asserting title in itself by right of capture, nor as the result of judicial condemnation, but, as this Court has declared, as trustee for the owner; and it therefore cannot be said, without reflecting upon the good faith of the Government, that the grant of a judicial remedy to the owner to obtain from the Government his property, of which the Government declares itself to be the possessor in trust, is an act of mere grace and favor, and not the performance

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of a duty. To have refused a remedy in such a case would have placed the Government before the law, and in the eyes of other civiliezd States, in a position not pleasing to contemplate.

4. By the Act of July 27, 1868, relating to the jurisdiction of the Court of Claims, Congress thought proper to limit the right to sue in that Court to subjects of those nations which accord to citizens of the United States the right to prosecute claims against their Government in their courts. Great Britain does accord this privilege.

U. S. *vs.* O'Keefe, 11 Wal., 179.

"Evidently," the Court say, "Congress meant to confer on the British subject the right to sue in the Court of Claims, under the Act relating to captured and abandoned property, if in the ordinary course of the administration of justice in England the law secures to the American citizen the right to prosecute his claim against the Government in its courts."

The sole question, then, is one of *personal status* under the Act, and it resolves itself into this: whether the claimant is to be excluded from our courts, denied judicial relief for the recovery of his property held by the Government in trust, *because he gave aid and comfort to the rebellion.*

The Court of Claims was instituted as much for the benefit of aliens as citizens. As a Brit-

ish subject, the claimant's status there is as good as that of an American citizen. If he is barred out and excluded, it must be because he has committed some offense that carries with it this penalty. To impute to him this offense unless he has violated some law binding upon him as a rule of action, would be an act of gross injustice, and in both law and reason a monstrous absurdity.

"All general terms," this Court say, "in statutes should be limited in their application so as not to lead to injustice, oppression or any unconstitutional operation, if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature."

Carlisle's Case, 16 Wal., 16.

But the decision appealed from is in manifest disregard of this ancient and settled rule of interpretation. Of this a striking instance is to be found in the opinion of Judge Richardson, (p. 22.) The organic law of 1863, he says, requires suitors in that court to show that they have at all times borne true *allegiance to the United States.* This would exclude all non-resident aliens at once. Their allegiance is exclusively due to their own governments. While that Act has in fact no bearing upon the case—the Captured and Abandoned Property Act alone governing it—the illustration exposes the fallacious reasoning on which the claimant is turned out of Court. The same fallacious premises and reasoning, the same omission to place proper limitations upon general expressions, so as to make them compatible

with law and right reason, led to the conclusion that the same acts which would, on the part of an American citizen owing loyalty, fealty and allegiance, amount to giving "aid and comfort," would amount to giving aid and comfort and constitute a bar if done by a British subject, who owed neither loyalty, fealty nor allegiance to this government; whereas it is clear that although in the one case they were criminal, in the other they were perfectly lawful.

If a claimant has done nothing but what he might lawfully do, his case is no more within the contemplation of the statute than was the act of the surgeon within the Bolognian law against drawing blood in the streets. And if the acts done by the claimant were by law attended by certain defined consequences; if they were unlawful in a qualified degree or limited sense, and the law has attached to them certain defined and limited effects; if it has caused them to be attended merely by certain risks and hazards, then nothing is more certain than that it would be a violation of law to attribute to the acts any greater or different effect or consequence.

The following sentence from the opinion of this Court in Carlisle's case, with a merely verbal change, is singularly pertinent here. Speaking of the effect of a pardon, the Court say:

"This result follows, whether we regard the pardon as effacing the offense—blotting it out, in the language of the cases, as though it had never existed—or regard persons pardoned as necessarily exempted from the general language of the act which requires claimants to make

proof of their adhesion, during the rebellion, to the United States."

16 Wall., 153.

And we say, in this case it follows that the owner, Collie, did not, in the eye of the law, give aid or comfort to the rebellion, whether we regard persons in his situation—non-resident aliens—as exempted from the general language of the act which requires claimants to make proof of their adhesion during the rebellion to the United States, or whether public law be regarded as effacing from, or rather excluding, from the commercial traffic in which he was engaged, the element of wrong or illegality. That these elements must be found in the acts charged or relied upon, in order to bring them within the meaning of these words, "giving aid and comfort to the rebellion," was early settled in the case of U. S. *v.* Greathouse (2 Abbott's U. S. Reports), and has never since been questioned.

What Mr. Collie did under the protection and sanction of public law, he did by as high and ample a warrant as though this government had issued to him, under its great seal, its patent of authority for doing those acts, and neither in the one case nor the other could judicial construction annex any restrictions or attach any consequences not contained or involved in the authority under which he acted.

All English and other foreign merchants who sold goods and munitions of war to the various

agents in Europe of the Confederate Government, in a certain sense gave "aid and comfort" to the rebellion. But would this dealing come within the meaning of these words as used in this statute? The answer must be, No. The question admits of no other answer, and the reason is, because the merchants had a lawful right to sell the goods to Confederate agents.

Would the case be changed if the foreign merchants delivered the goods at Confederate ports by evading the blockade? Manifestly not, and for the same reason, if no law was violated in so doing; and it will appear in the sequel that no law forbade such enterprises. If this is so, it would be a gross perversion of legal principles to attach to such commerce the punitory effect of depriving a claimant of a status in court to ask of the Government a restoration of his property. The law punishes according to rule and measure, defining the offense and prescribing the penalty, between which a due proportion is maintained. But such punishment would be more eccentric than the justice of a Turkish cadi; for no law declares the act an offense; no penalty is prescribed; no conceivable relation exists between the extent of the offense and the measure of the indirect punishment inflicted; and the delivery at a Confederate port of a box of army shoes might involve the practical confiscation of millions worth of property; for if the claimant has, in legal intendment, given any aid and comfort, the extent of that aid and comfort is quite immaterial.

"Words in statutes, if they be general and

not express or precise, shall be restrained unto the fitness of the matter or person."

Bacon's Maxims, pp. 52, 58, 59.
Plowd., 467.
Dwarris Stat., 551.

"*Nullus videtur dolo facere qui suo jure utitur.*"

Broom's Max., 132.

4. It is proposed, in the next place, to inquire into the character of the acts of Mr. Collie, in judgment of law, which are alleged to constitute the giving aid and comfort to the rebellion by him, and therefore a bar to the recovery of the proceeds of his captured property. Those acts, however numerous and however they may vary in particular features, amount to trading to Confederate ports in general merchandise and war material, and to mercantile transactions with citizens of the Confederate States, agents of the Confederacy, one of the States composing the Confederacy, and the Confederacy itself. In short, putting aside certain sentimental considerations founded upon Mr. Collie's mercenary expressions of sympathy for the rebellion, the gift of some Whitworth guns and of some money for the poor, his alleged offense is summed up in the fact of his having traded extensively in general merchandise and munitions of war to blockaded Confederate ports. The question is, what judg-

ment the law pronounces on such conduct by a person in the situation of Mr. Collie.

5. The fact that the ports to which he traded were blockaded implied the recognition of the Confederacy as a belligerent, at least for all the purposes of commercial intercourse with neutral states; and thereupon the public law applicable to a state of blockade of the ports of a recognized belligerent came at once into operation.

When the Government, in deference to the views and protests of other nations, waived the exercise of its sovereign authority to close the ports of the insurgent States and established a blockade thereof instead, it declared to the world that public law alone was the rule of conduct by which neutrals were to be governed in the premises, and that the penalties denounced by that law, and *none other*, would attend commercial intercourse with those ports.

6. A belligerent status, with its attendant rights and obligations, was early acquired by the Confederacy, and recognized by our Government, and it continued unimpaired during all the period covered by the transactions in question.

The Prize Cases, 2 Black, 695.
Mauran *v.* Insurance Co., 6 Wal., 114.
Thorington *v.* Smith, 8 Wal., 10.

Many other authorities, and the Treaty of Washington itself, might be referred to in proof of the existence of this status; but as that proposition will not be controverted, it is not necessary to enlarge upon it.

Insurgents are not recognized as belligerents until they have succeeded in organizing a political society, and in creating a government *de facto*. The concession of a belligerent status is a recognition of these facts. By this concession, as Mr. Dana says, "they gain the great advantage of a recognized status, and the opportunity to employ commissioned cruisers at sea, and to exert all the powers known to maritime warfare, with the sanction of foreign nations They can obtain abroad loans, military and naval materials, and enlist men as against everything but neutrality laws; their flag and commissions are acknowledged, their revenue laws are respected, and they acquire a *quasi* political recognition.

"On the other hand, the parent government is relieved from responsibility for acts done in the insurgent territory; *its blockade of its own ports is respected, and it requires a right to exert against neutral commerce all the powers of a party to a maritime war.*"

Dana's Wheaton, p. 37.

7. With regard to commercial intercourse with neutral states, an insurrectionary government existing *de facto* as a political organization, and

recognized as a belligerent, stands upon exactly the same footing as the parent State. Such intercourse is entitled to all the protection of public law that attends commercial intercourse between iudependent nations, and is subject to no restrictions except those attaching to all commercial intercourse in time of war, according to the principles of that law.

"Sovereignty, *so far as neutrals are concerned*, is an attribute of communities in the enjoyment of belligerent privileges."

Hall, Rights and Duties of Neutrals, p. 15.

"It is," says Mr. Dana, "among the duties of a government to keep open to its subjects commercial intercourse with all practicable parts of the world, the privileges of travel and sojourning, and all the forms of intercourse beneficial to humanity; and to make arrangements for the protection of its citizens in their pursuits. To that end, among the frequent convulsions of States it is often necessary for a foreign power to deal with the party in possession of a portion of the State. To wait till the question of right is determined, would be to suspend no small part of the life of nations."

Dana's Wheaton, pp. 37, 41.

From these premises it follows that commercial intercourse on the part of neutrals with the Confederate States, stood in point of law on exactly the same footing as the like intercourse with the loyal States. The ports of each were subject to blockade

by the other, and the same incidents would attend a breach of blockade in either case. Contraband of war sailing to the ports of either belligerent was subject to capture by the other, and lawful prize. In fine, as to commerce, public law recognized no difference whatever between the Federal Government and the Confederacy.

8. The question then is, does public law declare trading to a blockaded port of a recognized belligerent to be an offense? Is it denounced by that law as illegal?

Can it be pronounced giving aid and comfort to the rebellion *unlawfully?*

If not, there is an end of the question, and of the defense; for it is ridiculous to speak of a lawful act as creating a bar to a legal remedy. Congress never intended such an absurdity.

All jurists and publicists, without exception, agree in pronouncing such traffic, whether in contraband of war or in merchandise not contraband, perfectly lawful, and subject *only* to the right and risk of capture, as that right is limited and defined by public law.

This proposition was very broadly affirmed by this Court in the case of the *Santissima Trinidad*, 7 Whea., 283, where the Court say: "The sending of armed vessels or munitions of war from a neutral country to a belligerent port, for sale as articles of commerce, is unlawful

only as it subjects the property to confiscation and capture by the other belligerent."

In Richardson *vs.* Marine Ins. Co., 6 Mass., 113, the Court say: "A neutral merchant is not obliged to regard the state of war between other nations, but if he ships goods prohibited *jure belli* they may be rightfully seized and condemned. It is one of the cases where *two conflicting rights may exist, which either party may exercise without charging the other with doing wrong.*"

In Seton, Maitland & Co. *vs.* Low, 1 Joh. Ca., 1, which was an action on a policy of insurance; it was held that articles contraband of war were *lawful* goods within the meaning of the policy.

"It may be said," Judge Kent observes (p. 5), "that the law of nations is part of the municipal law of the land, and that by that law contraband is prohibited to neutrals and consequently unlawful. This reasoning is not destitute of force, *but the fact is that the law of nations does not declare the trade to be unlawful.*"

He further says in the same case:

"A neutral has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade; and yet, at the same time, from the law of necessity, as Vattel observes the powers at war have a right to seize and confiscate the contraband goods, and this they may do on a principle of self-defense. The right of the hostile power to seize does not destroy the right of the neutral to transport. The trade by a neutral in articles contraband of war, is there-

fore *a lawful trade*, though a trade, from necessity, subject to inconvenience and loss."

In the case of the *Helen*, 11 Jurist, N. S, Pt. 2, p. 1025—a case growing out of the rebellion—Dr. Lushington says:

"The defendants say that the agreement to break the blockade by a neutral ship is on the part of all persons concerned illegal according to the law of nations, and that the law of nations is a part of the municipal law of the land —*ergo* this contract was illegal by municipal law. Now a good deal may depend on the sense in which the word illegal is used. I am strongly inclined to think that the defendants attach to it a more extensive meaning than it can properly bear, or was intended to bear by those who used it. The true meaning, I think, is that all such contracts are illegal so far that, if carried out, they would lead to acts which might, under certain circumstances, expose the parties concerned to such penal consequences as are sanctioned by international law for breach of blockade or for the carrying of contraband. *If so, the illegality is of a limited character.*"

In another case growing out of the rebellion, (*Ex parte* Chavasse *v.* Grazebrooke, 11 Jurist, N. S., Pt. 1, p. 400), Lord Westbury, among other things, says:

"The title of the belligerent is *limited entirely* to the right of seizing and condemning as lawful prize the contraband articles. *He has no right to inflict any punishment on the neutral trader, or to make his act a ground of complaint*

against the neutral State of which he is subject. In fact, the act of the neutral trader in transporting munitions of war to the belligerent country is *quite lawful*, and the act of the other belligerent in seizing and appropriating the contraband articles *is equally lawful.* Their conflicting rights are coexisting, and the right of the one party does not render the act of the other party wrongful or illegal."

In answer to certain complaints of the Mexican Government, on the subject of aid to Texan insurgents, Mr. Webster wrote to our Minister, Mr. Thompson, in the following terms:

"As to advances, loans, or donations of money made by individuals to the Government of Texas or its citizens, the Mexican Government hardly needs to be informed that there is nothing in this so long as Texas is at peace with the United States. These are things which no Government undertakes to restrain."

Exec. Docs., 27th Cong., 1841–2; v. 5 Doc., 266.

Authorities in support of the proposition that the traffic in which Mr. Collie was engaged with the Confederate States was perfectly lawful, and attended by no other consequence than the risk and right of capture, according to the rules of public law defining that right, might be almost indefinitely extended; but as this proposition has not been controverted at any stage of this case, and moreover, as the subject will be dealt with at large in the main brief filed in this cause, it is not thought needful in these notes of argument to make further reference to

these authorities. It is submitted then, that Mr. Collie was not an offender against any principle of public law by reason of anything he did. This being so, so far as that law is concerned, he stands before the Court perfectly innocent of all wrong doing, and hence it cannot be said of him that he gave *aid and comfort to the rebellion* within any permissible interpretation of those words. It is conceded that Congress left the subject of neutral traffic with the Confederate States, as it was its duty to do, to be governed by the rules and principles of public law, without attempting to change or modify those rules in any manner.

The Act of Congress of July 13, 1861 (12 Stat. at Large, p. 257), prohibits commercial intercourse between the loyal and insurgent states. The Act of Aug. 6 of the same year (12 Stat. at Large, p. 319) provides for the capture and confiscation of property used or employed in aiding the insurrection. The Act of July 17, 1862 (12 id., p. 589), provides for the punishment of treason and rebellion, and for the seizure and confiscation of the property of rebels, and designates the persons within the purview of the act. None of these acts have the slightest reference to neutral commerce, or to any form of communication between the subjects of neutral States and the Confederacy.

9. It is nevertheless strenuously argued on behalf of the Government, and as strenuously insisted in the opinions of the Judges of the Court of

Claims, that the traffic in question was contrary to public policy, and that therefore a person engaged in it ought to be excluded from our courts of justice, denied a remedy for the recovery of his property held by the Government confessedly without a title, and in short, that he ought to be outlawed. This is an extraordinary conclusion from the premises.

But there is no warrant for the assertion that the traffic in which Mr. Collie was engaged was contrary to public policy. Nothing can be contrary to public policy which is not prohibited by either the written or unwritten law of a country. If Congress had intended to assert a public policy on this subject, it would have formulated that intention in a statute, that the commercial world might be warned that Congress had thought proper to limit or attempt to limit the principles of public law governing commercial intercourse with the insurrectionary States. Congress did not do so, and it is therefore not allowable to say that the claimant was bound by any other rule of conduct than that prescribed by the law of nations. It is not allowable to turn the claimant away from our courts of justice, and refuse him restitution of his property on sentimental grounds.

It is manifest that to deny a right of recovery in these cases on the ground of the want or the absence of that personal status which the statute requires, involves the punishment of the claimant indirectly for acts which, with concurrent voice, all jurists and publicists pronounce to have been lawful acts. It would certainly be a grave departure from settled prin-

ciples thus to annex to neutral traffic a punishment unknown to public or municipal law.

The truth is that our Government, from its foundation, has been the most strenuous upholder of neutral rights in all the world. The geographical situation of the country, and the eminently commercial character of its people from the beginning commended to our statesmen and jurists the wisdom and policy of firmly maintaining acknowledged neutral rights of commerce, and of extending those rights to the greatest possible limit. The executive and judicial departments of the Government, whenever the question of neutral rights has been presented, have claimed for them the largest possible latitude, and it is matter of history that to this country, more than to any other, is due the beneficent amelioration of the law of nations on this subject within comparatively recent times.

These historical facts are so familiar to this Court, whose decisions exhibit a more enlarged and liberal view on this subject than those of any other judicial tribunal in any country, that the citation of authority in support of them cannot be necessary, and therefore the subject will be dismissed with a reference to one author only Chancellor Kent says:

"It was contended on the part of the French nation in 1796, that neutral governmenis were bound to restrain their subjects from selling articles contraband of war to the belligerent powers; but it was successfully shown on the part of the United States, that neutrals may

lawfally sell at home to the belligerent purchaser, or *carry themselves* to the belligerent powers, contraband articles subject to the right of seizure *in transitu.*"

Kent's Com., v. 1, p. 142.

But it is said, on behalf of the Government, that this property was "*peccant property.*"

This idea is certainly a novel one. The Court of Claims has found that the cotton was bought with the proceeds of general merchandise run through the blockade, and sold in the course of commercial transactions with the people of the Confederate States. This merchandise certainly might have been libelled and confiscated if it had been captured *in transitu*, but as it was not so captured there was an end of the matter. Certainly no one ever thought of following and confiscating the proceeds of such traffic, wherever found, as one of the penalties attaching to it.

If such confiscation by seizure, followed by judicial proceedings for that purpose, could not have been justified by law, certainly the same result is not to be arrived at by the indirect and objectionable process of denying restitution of the property merely because the Government has it in possession and has the physical power to keep it, regardless of law. Moreover, it is quite obvious that if Congress had regarded property of this character, so seized, as *peccant property*, it would have been designated as be-

longing to that class of property which was made subject to confiscation; but it was not so designated. It was not confiscated nor intended to be, but the Government came under an obligation to restore its proceeds to its owners, provided they had not been guilty of giving aid and comfort to the rebellion.

10. If the main premise of this argument is sound it necessarily follows that this case is not governed by the doctrine of Sprott's case or Whitfield's case, for a title was acquired in the course of transactions not prohibited by law, and therefore it cannot, in the language of Judge Nott, be called an "improperly acquired title."

Whitfield's case was decided on the ground that the title to the cotton had passed to the Confederate Government, and therefore Whitfield was not the owner. The Court adds: "But if this were otherwise, it is not easy to see how his claim, growing out of his illegal contract as it does, can be enforced against the United States in the Court of Claims. In Sprott *vs.* The United States, it was decided that *one owing allegiance to the Government of the United States*, and claiming under a contract, could not avail himself of the courts of the country to enforce a claim under a contract by which, for the sake of gain, he knowingly contributed to the vital 'necessities of the rebellion.'"

92 U. S., 170.

It is at once apparent that there is no similarity between either of these cases and the case at bar.

Sprott was a citizen of the United States, to whom his allegiance was due. In violation of his duty and in breach of his allegiance, he aided the Confederate Government with money for the purpose of enabling it to prosecute hostilities against his own Government, and took in exchange for it cotton. The transaction stood upon the same ground as though he had traitorously taken up arms and actively prosecuted hostilities on behalf of the Confederacy against his own Government, and had bargained for the cotton in payment for that service. The ground of the decision, as stated in the following paragraph, plainly shows that the case has no features in common with the case at bar: "That any person," the Court say, "*owing allegiance* to an organized government, can make a contract by which, for the sake of gain, he contributes most substantially and knowingly to the vital necessities of a treasonable conspiracy against its existence, and then in a Court of that Government base successfully his rights on such a transaction, is opposed to all that we have learned of the invalidity of immoral contracts. A clearer case of turpitude in the consideration of a contract can hardly be imagined, unless *treason* can be taken out of the catalogue of crimes."

20 Wal., p. 463.

In the case at bar, as we have seen, the acts of Mr. Collie were confined to that traffic in which a neutral might lawfully engage, subject

only to the exercise of the correlative and equally lawful right of the Government to capture and condemn his merchandise on its way to or from the blockaded ports of the Confederacy. In this there was neither *treason* nor *crime* of any shade or kind.

11. It was also argued on behalf of the Government that the case was within the principle of Kennett *vs.* Chambers, 14 How., 48. In that case an action was brought for the specific performance of a contract made between a citizen of the United States and an inhabitant of Texas, then in revolt against Mexico, the object of which was to raise men and procure arms to carry on the war with Mexico; and the Court declined to entertain the action on the ground that the contract was in direct violation of our national obligations to Mexico, amounting as it did to a breach of neutrality. The Court say (p. 50), "When that authority [the Government] has plighted its faith to another nation, that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the Government upon which he himself has agreed to confer the power. It is his own personal compact, as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities

against the territories of a country with which our Government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation."

Neither the independence of Texas, nor its status as a belligerent, had at the time of making this contract been acknowledged by this Government. There was nothing but an incipient domestic revolt, and the object of this contract was to strengthen and extend it, and amounted to a breach of the neutrality of this Government. Whereas, as we shall see, Mr. Collie did not violate Her Majesty's proclamation of neutrality, and if he had done so, no department of this Government could punish him, directly or indirectly, for so doing.

Later, Mr. Webster, then Secretary of State, in answer to a complaint made by M. de Bocanegra, Secretary of State and Foreign Relations of the Government of Mexico, in a communication to Mr. Thompson, our Minister to that Government, laid down the law in regard to the right of American citizens to carry on trade with Texas, and he distinctly affirms that trade to be perfectly lawful, attended by no other incidents than such as are annexed to it by public law. He says:

"M. de Bocanegra is quite well aware that it is not the practice of nations to prohibit their own subjects, by previous laws, from trafficking in articles contraband of war. Such trade is carried on at the risk of those engaged in it, under the liabilities and penalties prescribed by the law of nations, or by particular treaties. If

it be true, therefore, that the citizens of the United States have been engaged in a commerce by which Texas, an enemy of Mexico, has been supplied with arms and munitions of war, the Government of the United States, nevertheless, was not bound to prevent it, could not have prevented it without manifest departure from principles of neutrality, and is in no way answerable for the consequences."

Webster's Works, vol. 6, p. 451.

The bearing of the case of Kennett *v.* Chambers, therefore, is misconceived.

Sir Roundell Palmer, then Solicitor-General, in a speech in Parliament, delivered in February, 1862, and quoted in Lawrence's Wheaton, expressly declared that it was not a breach of Her Majesty's proclamation of neutrality, or of the Foreign Enlistment Act, or otherwise unlawful, for British merchant vessels to run the blockade of the Confederate ports with articles contraband of war on board. His language is as follows:

"I think it desirable that a few words should be said to correct a total misapprehension of a matter of law into which the honorable gentleman opposite has fallen. He implies by the terms of his notice of motion, and more distinctly stated in his speech, that all masters of British merchant vessels, who may have run the blockade with articles contraband of war on board, have been guilty of illegal acts, in violation of Her Majesty's proclamation, which the Government of this country, having their attention called to them, ought to have interfered to pre-

vent, but had not done so. He has also suggested that the authorities of the port of Nassau must be subject to serious blame for having permitted ships under similar circumstances to call at that port and to take in supplies, and to have the benefit of calling and remaining there when they had on board articles contraband of war which the honorable gentleman seemed to suppose that Her Majesty's proclamation had made it illegal for them to have on board, and which therefore they could not be permitted to carry without a violation of neutrality. In all these respects the honorable gentleman has totally misunderstood the law. This country is governed by law, and except as far as Her Majesty's Government have powers by law to control the action of private British subjects, whether masters of ships or others, of course they are perfectly powerless in the matter.

"The only law which enables Her Majesty's Government to interfere in such cases is commonly called the Foreign Enlistment Act, and the whole nature and scope of that act is sufficiently and shortly set out in the title. It is, 'An Act to prevent the enlisting and engage-'ment of Her Majesty's subjects to serve in 'foreign service, and the fitting out or equip-'ping in Her Majesty's dominions vessels for 'warlike service, without Her Majesty's license.'

"That Act does not touch in any way whatever private merchant vessels, which may carry cargoes, contraband or not, between this country, or any of the dominions of Her Majesty, and any port in a belligerent country, whether under blockade or not; and the government of this

country, and the governments of our colonial possessions, have no power whatever to interfere with private vessels under such circumstances.

"It is perfectly true that in the Queen's proclamation there is a general warning at the end addressed to all the Queen's subjects that they are not, either in violation of their duty to the Queen, as subjects of a neutral sovereign, or in violation or contravention of the law of nations, to do various things, one of which is carrying articles considered and deemed to be contraband of war, according to law or the modern usages of nations, for the use or service of either of the contending parties.

"That warning is addressed to them, to apprise them that if they do these things they will have to undergo the penal consequences by the statute, or by the law of nations, in that behalf imposed or denounced. In those cases in which the statute is silent, the Government are powerless and the law of nations comes in.

"The law of nations exposes such persons to have their ships seized and their goods taken and subjected to confiscation, and it further deprives them of the right to look to the Government of their own country for any protection. And this principle of non-interference in things which the law does not enable the Government to deal with, so far from being a violation of the duty of neutrality—which the Government are sincerely anxious to comply with—is in accordance with all the principles which have been laid down by jurists, and more especially

by the great jurists of the United States of America."

Parl. Debates, cited in Lawrence's Wheaton (Boston, 1863), 813, 814, note.

Indeed, if Mr. Collie could be regarded as having committed an offense against this Government, this Government would not be at liberty to inflict any punishment for that offense, directly or indirectly. His own Government alone would have jurisdiction for that purpose.

"The power of the belligerent is not to "punish the author of the act which injures "him, but to prevent this act from being con- "summated; that the contraband should not "be carried into the country of his enemy; to "seize these articles when they are destined to "the ports of his adversary."

Hautefeuille, cited Law. Whea. 808, note.

The idea is not to be entertained that Congress intended, by indirection, not only to prescribe a rule of conduct to neutrals and create an offense unknown to public law, but in this particular class of cases to inflict the penalty of forfeiture and confiscation of property, when it has no jurisdiction to inflict any penalty at all.

12. The foregoing considerations would seem to be decisive in favor of the claimant. There is another view, however, of the case, which will

be elaborated in a separate brief and need only be referred to here in passing. If it can be maintained, contrary to the argument here advanced, that Collie offended against the laws or policy of this Government, it cannot be said that that offense was an unpardonable offense; for such an offense is unknown to our law. The power of the President to pardon is commensurate with the capacity of any human being to transgress the laws of the United States. If, therefore, Collie be taken out of the list of unoffending traders and be placed in the list of offenders, as having given aid and comfort to the rebellion, it would seem necessarily to follow that he must be within the scope of the proclamation of amnesty, and be relieved by that proclamation of any disability attaching to his so-called acts of aid and comfort, and with this question neither his nationality nor domicil has anything to do.

It is submitted that, in any view that can be taken of this case, the position of the Government is altogether indefensible, and that the judgment appealed from should be reversed.

W. W. MACFARLAND,
Of Counsel.

United States Supreme Court,

APPEAL FROM THE COURT OF CLAIMS.

JOHN YOUNG, Assignee and Trustee in Bankruptcy of ALEXANDER COLLIE,

Appellant,

vs.

THE UNITED STATES,

Appellees.

SPECIAL BRIEF FOR APPELLANT UPON PARDON.

JAMES THOMSON,
Of Counsel.

New York:
SAMUEL HAMILTON'S SON, PRINTER, 61 Cedar Street, N. Y.

1878.

SUPREME COURT

OF THE UNITED STATES.

JOHN YOUNG, Trustee in Bankruptcy of ALEXANDER COLLIE,

Appellant,

against

THE UNITED STATES,

Respondents.

Brief as to pardon.

In the apportionment between counsel of the preparation for argument, it has been assigned to us to make a special brief upon the pardon of Mr. Collie and its effect upon the claim herein.

The same has been prepared with the fullest confidence in a determination by the Court that no act of Mr. Collie has established against him any disability to sue for, claim and recover the proceeds of his cotton, but only out of abundant caution and in deference to the large amount involved.

For convenience, and in order to avoid the constant use of hypothetical words, we will assume throughout to be the case, what in fact we maintain to be exactly the reverse, viz.: that Collie, were

it not for his pardon, lies under a disability to sue for and recover the avails of his cotton.

STATEMENT.

The appellant's case for obtaining the proceeds of his cotton is in the alternative, viz.: Either,

1. Collie was not guilty within the proper construction of the acts of March 3d and March 12th, 1863, of the offense of giving aid and comfort to the rebellion, or of having voluntarily aided, abetted, or given encouragement thereto, so as to bring upon him a disability in respect of recovering the proceeds of his cotton, which would amount to a virtual forfeiture or confiscation of that property.

Or,

2. If so guilty of such offense and made liable by said Acts of Congress to such disability, he was amnestied and pardoned and the disability removed, and his rights of property restored by the President's general amnesty proclamation of December 25th, 1868.

The Government, to sustain their defense, must meet both these points in the conjunctive, and establish that he was guilty of an offense for purposes of such disability, but not sufficiently guilty of an offense to be subject of a pardon.

In fact, to deprive him of the proceeds of his cotton because he was guilty of an offense and to claim him unpardoned because he was not.

The Government claim must establish that there is a line upon which they may proceed, lying between the power of Congress to establish an offense, or impose a disability, and the power of the President to pardon the same.

In the many learned and conflicting opinions

which have been written upon this case in the Court of Claims, this matter has had little or no consideration, and the embarrassing task of grappling with the subject in the conjunctive, or of seriously considering both horns of the dilemma, has been omitted.

The learned Chief Justice of the Court of Claims, in his second opinion, gives indication of having recognized the dilemma, and the necessity of making some answer upon the subject of pardon.

He meets the necessity with a strong *ipse dixit*, stated in the most emphatic language, but without any reference to precedent or principle to support the same.

The language which disposes of this vital subject is as follows:

" Beyond controversy neither pardon nor amnesty applies to him who has not been guilty of a criminal offense against the Sovereign or State.

Equally beyond controversy, Alexander Collie's, sending munitions of war from the country of his domicile to the Rebel States, was not an act which subjected him to punishment under the laws of the United States.

The worst that could befall him was the capture in transitu of those munitions.

Hence it follows as a clear, inevitable conclusion that he was not the subject of the amnesty, and, therefore, can claim nothing through it."

The great merit of this determination is its vigor, and yet it is not any more vigorous and pronounced than the language of the first opinion of the Court of Claims, in which the learned Chief Justice joined in favor of the claimant, and upon a case which is declared by his colleague to be " now in precisely " the same plight that it was in when first tried."

The only other mention of the subject of pardon, in the many opinions delivered in the Court of Claims, is by his honor Judge Richardson.

He saw the futility of resting a decision against the claimant upon the curious and novel distinction between an offense and a " criminal " offense.

He, therefore, with an energy not inferior to that of the learned Chief Justice himself, denounces such distinction absolutely and emphatically, and he substantially stigmatizes the Chief Justices' theory for defeating the claimant, as " an attempt to make a " distinction where none exists in law."

We quote what Judge Richardson says upon the subject:

" To the President is given the power to pardon, and that power is commensurate with the right in Congress to declare punishments.

By whatsoever words Congress describes treason, or *any other offense*, and attaches thereto a punishment, *in whatever form*, either by imprisonment or fine, by political disabilities, or civil disabilities of extensive application, *or simply by disabilities to sue in this or any other Court*, the President's power of pardon extends to and reaches it, and by his constitutional prerogative he may remove the same *in any case* according to his own will and pleasure, and that prerogative cannot be avoided *by any attempt to make a distinction where none exists in law,* and to attach disabilities to the act and not to the offense."

To support this sound statement of the law, with which he refutes the extraordinary distinction drawn by the learned Chief Justice, he cites the leading case of *Klein*, 13 *Wall.*, 128.

This glimmering of hope, however, of the claimant in the Court of Claims was short lived, for Judge Richardson hastens to supply the place of the refuted distinction of the Chief Justice, by another quite as curious and unfounded, viz.: that the power of the President to pardon is not co-extensive with the power of Congress to punish in respect of those

persons who do not owe allegiance to the Government.

He states it thus, " Having attached to the act of aiding, abetting or giving encouragement to rebellion a disability to maintain actions in this Court, that disability *whenever it applies to a person owing allegiance to the Government* may be pardoned by the President."

Of course this distinction is not supported by the learned Judge by precedent, or reasoning, any more than that of his honor the Chief Justice. They are each announced as naked sentences.

Beyond them, the Court of Claims is silent upon the subject of pardon.

FIRST POINT.

The President's power to pardon is the same as that held by the Crown in England at the time of the adoption of the American Constitution, and is unlimited and co-extensive with the power of Congress to punish offenses, or impose penalties, forfeitures or disabilities.

The Constitution provides: " The President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

The President's power to pardon, is thus by its terms unlimited, except as to impeachment.

In ex parte Garland, 4 *Wall.*, 380, the Court say: " The power to pardon thus conferred is unlimited, with the exception stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon,

nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restriction."

In *Osborn vs. The United States*, 1 *Otto*, 478, Field *J.*, says:

"The Constitutional grant to the President of the power to pardon offenses must be held to carry with it as an incident the power to release penalties and forfeitures which accrue from the offenses."

In *People vs. Potter*, 1 *Parker Crim. Cas.*, N. Y. 57, Edmonds, *J.*, says:

"The word pardon includes a remission of the offense or of the penalties, forfeitures or sentences growing out of it, and may be of a part or of the whole of these things."

Kent says:

"The power of pardon vested in the President is without any limitation except in the simple instance of impeachment."

In *U. S. vs. Klein*, 13 *Wall. p.* 147, the Chief Justice says:

"To the Executive alone is intrusted the power of pardon, and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences."

In the case of *Armstrong's Foundry*, 6 *Wall*, 769, the Judge says:

"We think it clear that the statute considered the consent of the owner to the employment of his property in aid of the rebellion as an offense, and inflicted forfeiture as a penalty. The general pardon of Armstrong therefore relieved him of so much of the penalty as accrued to the United States."

In *Rawle on the Constitution, Chap. XVII.* after stating that the President's power to pardon is general and unqualified, and extends alike to the highest and lowest offenses, including the remission

of fines, penalties and forfeitures under the revenue laws, it is added.

"The Constitution empowered Congress in four enumerated cases to provide the punishment. They are treason, piracy, offenses against the law of nations and counterfeiting the securities and current coin of the United States.

The power of Congress to inflict punishment in other cases is derived from implication only, and it is necessary to carry the Constitution into effect, and is embraced in the general provision to pass all laws which may be necessary and proper. *The pardoning power is as extensive as the punishing power, and applies as well to punishments imposed by virtue of laws under this implied authority as to those where it is express.*"

The effect of a pardon is clearly and concisely stated by Mr. Henry Stanberry, as Attorney General, as follows:

"The effect of a pardon is to discharge a person from all penal disabilities which attach by law to the offense pardoned. *It is co-extensive with the punishing power and is applicable to the remission of fines, penalties and forfeitures which are imposed by law as punishment for offenses:*

12 *Op. Atty. Gen.*, *p.* 81.

But it is suggested by the learned Chief Justice of the Court of Claims:

"Beyond controversy, neither pardon nor amnesty applies to him who has not been guilty of a *criminal* offense against the sovereign or state."

Does then the President's power to pardon offenses only extend to acts of a "criminal" nature, and is it restricted in the remission of penalties, forfeitures or disabilities to those imposed in consequence of such criminal acts alone? And is the President without power to pardon such offenses as are established by Congress, if the same fall below

the grade arbitrarily defined by the Chief Justice as "criminal" offenses?

The Constitution itself contains no such limitation. Nothing is there to be found about "criminal" offenses.

This is a phrase, by which it is proposed to restrict and limit the general prerogative power of pardon conferred by the Constitution, and reduce it below the power of Congress to punish offenses or impose forfeitures or disabilities.

Every attempt thus to restrict the power of pardon there granted has been resisted by the Courts, and the law is settled that the *old prerogative power of pardon, as it existed in England at the date of the Constitution, was by that instrument vested in the President of the United States.*"

What then was the prerogative power of pardon at the time it found a place in the Constitution?

It is summed up as follows in Bacon's Abridgment:

"The pardon removes all punishment and legal disability."

A pardon is said by Lord Coke to be a work of mercy, whereby the king either before attainder, sentence or conviction, or after, forgiveth any crime, offense: punishment, execution, right, title, debt, or duty, temporal or ecclesiastical.

3 *Inst.* 233.

"It is laid down in general that the king may pardon any offense whatever, whether against the common or statute law, so far as the public is concerned in it, after it is over, and consequently may prevent a popular action on a statute by pardoning the offense before the suit is commenced."

7 *Bacon Abridg.* 406.

"If the King, after verdict upon an obligation and *non est factum* pleaded, pardons all debts, and

judgment be afterwards entered, yet it shall be discharged by the pardon."

5 *Comyn. Dig.* 243, *citing* 3 *Inst.* 235.

"A pardon of a debt discharges all suits for it, and *vice versa.*"

Ibid citing 3 *Inst.* 235.

The only limit we find to the King's pardoning power is where it interferes with the vested right of individuals.

"The King can by no charter whatsoever bar any right of entry or action, or any legal interest or benefit *before vested in the subject.*"

7 *Bacon Abridg., p.* 407, citing many cases.

"No pardon from the King shall divest any interest *vested in the subject.*"

Ibid, p. 418.

These authorities clearly show that the power of the King to pardon is not confined to "criminal" offenses, or to penalties imposed as punishment for acts made criminal, either at common law or by statute, but includes all cases even to mere debts and obligations incurred without any reference to what is a technical, *i. e.*, a criminal offense.

But it is unnecessary to present authorities on this point to the Attorney General.

One of his predecessors, Attorney General Bates, in referring to the power to remit forfeitures, fines, and penalties (as distinct from the pardon of crimes) says, that the King of England had both these powers.

10 *Op. Atty. Gen. p.* 452.

And yet it is now suggested that the pardon clause in the Constitution has not given to the President power to remove a disability imposed by Congress otherwise than as criminal punishment, though it was undisputedly a part of the King's prerogative of pardon.

Now the prerogative power of the King of England which is thus unlimited in its application, is precisely the power which, by the Constitution, is vested in the President of the United States.

The consideration of this clause in the Constitution first came before the Supreme Court of the United States in

The United States vs. Wilson, 7 *Peters* 150.

Chief Justice Marshall, who delivered the opinion of the Court, says, p. 160:

"The Constitution gives the President in *general* terms the power to grant reprieves and pardons for offenses against the United States.

As this power has been exercised from time immemorial by the Executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

In Ex parte Wells, 18 *How. U. S.* 309, in answer to the claim of counsel that the Constitutional power of pardon conferred upon the President was more restricted in a certain case than the exercise of prerogative which the King of England had in such cases ; Wayne, *J.*, in delivering the opinion of the Court, says:

"We think this is a mistake arising from the want of due consideration of the word pardon. It is supposed that it was meant to be used exclusively with reference to an absolute pardon exempting a *criminal* from the punishment which the law inflicts *for a crime he has committed.*

But such is not the sense or meaning of the word either in common parlance or in law. In the first it is forgiveness, release, remission. Forgiveness for

an offense, whether it be one for which the person committing it is liable in law *or otherwise*. Release from pecuniary obligation, as where it is said, 'I pardon you your debts,' or it is the remission of a penalty, to which a person may have subjected himself by the non-performance of an undertaking or contract, or when a statutory penalty in money has been incurred and it is remitted by a public functionary having power to remit it.

In the law it has different meanings which were as well understood when the Constitution was made as any other legal word in the Constitution now is.

* * * * * * *

We might mention other legal incidents of a pardon, but those mentioned are enough to illustrate the subject of pardon, and the extent or meaning of the President's power to grant reprieves and pardons. It meant that the power was to be used according to law, that is, as it had been used in England, and these States when they were colonies.

* * * * * * *

And it was with the fullest knowledge of the law upon the subject of pardons and the philosophy of government in its bearings upon the Constitution, when this Court *instructed Chief Justice Marshall to say, in* 7 *Peters*, 162:

"The Constitution gives the President in general terms 'the power to grant reprieves and pardons for offences against the United States.' As this power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

We still think so, and that the language used in

the Constitution conferring the power to grant reprieves and pardons must be construed with reference to its meaning at the time of its adoption. * *

At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment.

We must, then, give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution."

Note.—For the debate on this clause of the Constitution see *Madison Papers, supplement to Elliot's Debates, pp.* 131, 380, 450, 549, 562.

Story says:

"Subject to these exceptions, [impeachment and contempt] (and perhaps there may be others of a like nature standing on special grounds) the power of pardon is general and unqualified, reaching from the highest to the lowest offense. *The power of remission of fines, penalties and forfeitures is also included in it*, and may, in the last resort, be exercised by the executive, although it is, in many instances, by our laws confided to the Treasury Department. *No law can abridge the constitutional powers of the Executive Department, or interrupt his right to interpose by pardon in such cases.*"

In the margin is the following note:

"Instances of the exercise of this power by the president in remitting fines and penalties in cases not within the scope of the laws, giving authority to the Treasury Department, have repeatedly occurred, and their obligatory force has never been questioned."

II Story on Constit. § 1504 *and note.*

The United States vs. Lancaster, 4 *Wash. C. C.* 64.

This was an action of debt on a bond given as security upon the release of a vessel seized and libelled in 1808, for a violation of the embargo law passed in that year.

The Pesident remitted to the defendant all the right and interest of the United States in and to said bond.

It was conceded that the President could, by his pardon, remit the part of the debt due the United States.

Washington *J.* says: "The question, then, is whether the pardon of the President, remitting the interest of the United States in and to the penalty or forfeiture of the bond on which this action was founded, can effect the moiety of the penalty claimed by the officers of custom."

This point, whether the President's pardon could defeat the inchoate rights of others, was not expressly decided because the judge held that as the President only remitted the *interest of the United States*, by this guarded language, he did not intend to extend his mercy to the injury of private interests.

The judge inclines, however, to the opinion that even in that extreme case, the President had the power to pardon if he chooses to exercise it.

In 2 Opin. Atty. Gen., 330 Berrien, cites with approval, the language of Story, and declares that: "The pardoning power is co-extensive with the power to punish, and is general and unqualified, except in cases of impeachment, and it consequently includes the power of remission of fines, penalties and forfeitures under the revenue laws."

He decides also that any power of remitting fines, etc., vested in the Secretary of the Treasury cannot be denied to the President's pardon. He says:

"If this be true in relation to the power exercised by the Secretary of the Treasury, under the author-

ity given him by law, to remit forfeitures. it does not seem to me that the power of pardon, which the Constitution has vested in the President, (which as we have seen, is co-extensive with the punishing power, and applicable to the remission of fines, penalties and forfeitures), can be restricted within narrower limits."

Can, then, the Secretary remit a fine other than for an indictable or criminal offense? Does his power extend to a case where, for example, the only means provided for enforcing the forfeiture is by a simple action for debt?

If it does, then we have the authority of the government law officer, to the effect that the President's power of pardon cannot be restricted within narrower limits.

In ex parte Marquand, 2 *Gallis*, 554, speaking of the Act of 1799, the Court says "There are, indeed, but two cases in which, technically speaking, fines are contemplated to be imposed by the Act, viz: in cases of obstructing officers of the customs, and of perjury. In all other pecuniary forfeitures within the Act, the legislature seems to have directed, *not the process of indictment*, where a fine might be imposed, but an action or information of debt."

It is there held that all these fines, penalties and forfeitures may be remitted by the Secretary of the Treasury, and, indeed, there is a query whether he can remit fines for offenses, technically speaking, thus limiting his power to cases where there is no criminal offense.

So Cushing holds, 6 *Op. Atty. Gen.*, 494, that the fact that the Secretary has the power to remit in certain cases does not supersede the ultimate power of pardon vested in the president.

So Taney says, 2 *Op. Atty. Gen.*, 492, "If this case were clearly embraced in the powers given to the treasury department, it would not and could not

deprive the president of the powers which belong to him under the constitution. The power conferred on the secretary, by the law of Congress would be merely in aid of the president and to lighten the labors of his office. It could not restrain or limit his constitutional powers."

To sum up

It follows from the authorities cited that the president's power of pardon is granted without limit; that instead of the "pardon for offenses" being limited to pardon for "criminal" offenses it includes the power of remission of fines, penalties, forfeitures and disabilities of all kinds (as distinct from the pardon of crimes); that where Congress can punish, the president can pardon, and that where Congress imposes a disability or penalty for doing a particular act the president can pardon the offense and thereby remove the disability or remit the punishment, be it fine and imprisonment, or mere disability, or; to quote again the words found in *Rawle on the constitution.*

"The pardoning power is as extensive as the punishing power and applies as well to punishments imposed by virtue of laws under the implied authority of Congress as to those where it is expressed."

In fine we cannot do better than draw from our learned adversaries themselves a full and summary disposal of the whole subject under consideration.

In 5 *Op. Atty. Gen.*, 536, the language of Marshall, *C. J.*, in 7 Peters, 160, cited above is cited with approval by Crittenden, Atty. Gen., who adds:

"To understand the meaning of a pardon and *the extent to which the power of pardoning may be exercised by the President of the United States*, we must look to the books of authority respecting the prerogative power of pardoning rightfully belonging to the King of Great Britain, to the common law of the people of England, whose principles of jurispru-

dence the people of the United States brought with them as colonists and established here, in so far as they were of a general nature and not repugnant to American institutions."

So far from attempting to restrict the president's power of pardon, the sole object of this Attorney General is to show that it is not greater than the prerogative power of the king. After citing the authorities he concludes,

"I cannot advise that the president's power of pardon is of *greater scope and extent* than that vested in the King of Great Britain, as a branch of the royal prerogative, and as understood and exercised in that country from time immemorial."

Again, the language of Marshall, *C. J.*, quoted above is cited with approval by Atty. Gen. Cushing, 6 *Op. Atty. Gen.*, 402, and he adds:

"To understand the meaning and extent of the power to grant pardons vested in the President of the United States, by the Constitution, we must have recourse to the meaning of pardons, established by common consent, custom and use antecedent to the formation of that Constitution."

Perhaps no better statement of the President's power of pardon can be found in the books than that of Atty. Gen. Cushing.

8 *Op. Atty. Gen.*, 283.

"There is but one exception to the President's power to pardon, which is the case of impeachment. There is no other exception. In all other respects the power is perfect, and co-extensive with the subject matter. The President may grant an absolute pardon or a conditional one. He may pardon before trial and conviction. His power extends to all penalties and forfeitures, as well as other punishment. He may do this by order of *nolle proseque* pending prosecution. He may do it by warrant of remission

in all cases, even those to which the statute authority of the Secretary of the Treasury extends.

And he may do it by the common form of a general warrant of pardon. And, in my judgment, he may do it for and at any time, either anterior to prosecution, or pending the same, or subsequent to the execution in part or in whole of sentence—subject, in the latter case, only to the limits of legal, moral or physical impossibilities."

SECOND POINT.

If the respondents should prevail as to their claim that Collie was disabled by the Statutes of March, 1863, from obtaining the proceeds of his cotton, it would be because Congress made the Act of voluntarily aiding, abetting or giving encouragement to rebellion, whether by citizen or alien, an offense against the United States, and imposed, as a punishment for such act, disability to sue in that Court, to which alone was given jurisdiction to restore captured and abandoned property.

In the Act of March 3d, 1863 (12 Stat., 765), under which the Court of Claims was organized, there is the following section:

"Provided, however, that in order to authorize the said Court to render judgment in favor of any claimant, if a citizen of the United States, it shall be set forth in the petition that the claimant and the original and every prior owner thereof, where the claim has been assigned, has at all times borne true allegiance to the Government of the United States, and *whether a citizen or not*, that he has not, in any way, voluntarily aided, abetted or given encouragement to rebellion against the said Government, which allegation may be traversed by the Govern-

ment, and if, on the trial, such issue shall be decided against the claimant, his petition shall be dismissed."

When Congress thus provided for a Court of Claims, and, by its terms, excluded from participation in its benefit, both citizens and aliens who did certain acts, we will assume that it did not intend to consider the abstract question whether a non resident alien can commit treason against the United States, to which he owes no allegiance. By this law then, the act of voluntarily giving aid to rebellion, whether by citizen or by alien, was made an offence against the United States. The punishment annexed was one that could be inflicted as well upon aliens as upon citizens,—a disability to sue in that Court, which Congress had created, and a consequent practical confiscation of property, which, by the contemporaneous captured and abandoned property act, it empowered the Government to seize, whether it belonged to the loyal or disloyal, to the citizen or to the alien.

In the case of *Armstrong's Foundry*, 6 *Wal.*, 769, the Chief Justice, in referring to a statute of Congress for the confiscation of rebel property, says:

"We think it clear that the statute regarded the "consent of the owner to the employment of his "property in aid of the Rebellion *as an offense, and* "*inflicted forfeiture as a penalty.*

"The general pardon of Armstrong therefore *re-*"*lieved him from the penalty.*"

So the Court of Claims act regarded the voluntarily giving aid to rebellion, whether by citizen or by alien, by those who did not owe allegiance as well as by those who did, as an *offense* against the United States, and *inflicted disability as a penalty.*

When, therefore, Congress saw fit to attach to the act of voluntarily aiding, abetting or giving encouragement to rebellion, a certain disability, and provided for its enforcement against citizens and

aliens alike, it made the doing of that act by either an *offense* against the United States. Punishment in the shape of a seizure of property, and disability to sue for its recovery back, was the penalty imposed.

Special words were used to bring aliens as well as citizens within the prohibition and the penalty imposed extended to and could be enforced against both alike.

It cannot then be claimed that the power to pardon may be exercised in behalf of the citizen, but cannot extend to the alien when the act to be pardoned has been made an offense against both?

It cannot be that Congress has the power to create the offense, but the President has not the power to remit the penalty; that instead of the power to pardon being co-extensive with the power to punish, Congress can impose a punishment to which the President's pardon cannot extend.

The statement of such a proposition carries its own answer, and in regard to it we repeat the language of Judge Richardson in this case:

"To the President is given the power to pardon "and that power is commensurate with the right "in Congress to declare punishments. By what-"soever words Congress describes treason *or any* "*other offense*, and attaches thereto a punishment "in *whatever form*, either by imprisonment or "fine, by political disabilities or civil disabilities of "extensive application, or *simply by disabilities to* "*sue in this or any other Court* the President's "power of pardon extends to and reaches it, and "by his Constitutional prerogative he may remove "the same *in any case* according to his own will "and pleasure, and that prerogative cannot be "avoided by any attempt to make a distinction "where none exists in law, and to attach disabili-"ties to the act and not to the offense."

No language could give to the pardoning power greater or more extended effect than this, and yet the authorities cited by us show that the learned judge only gave a correct statement of the extent of this Constitutional power conferred upon the President.

One thing is very clear, Judge Richardson does not believe in the theory of the Chief Justice, that the pardoning power is limited to pardon for "criminal" offenses any more than does the Chief Justice agree with Judge Richardson in that judge's novel theory to which we now call attention.

Let us see then how the learned judge applies this unrestricted prerogative power to the case at bar.

He continues and summarily disposes of the question of the claimant's pardon as follows:

"Congress thus having attached to the act of "aiding, abetting or giving encouragement to re- "bellion a disability to maintain actions in this "Court, *that disability whenever it applies to a "person owing allegiance to the Government may "be pardoned by the President.*"

The whole matter is disposed of by this *ipse dixit.* The President may pardon a disability imposed by Congress upon one owing allegiance, but then his power is spent. Congress, however, holding in reserve the *additional* power of imposing disabilities upon those who do not owe allegiance, which are unpardonable. This prerogative right, declared to be so absolutely unqualified and unrestricted, that Congress cannot by any words whatsoever describe an offense, or in any form whatever, attach thereto a punishment, be it fine and imprisonment, or simple disability to sue, which the President's pardon cannot reach, is declared to be practically limited and restricted in its operation by the Nationality of the individual upon whom the penalty or disability is imposed.

In so deciding the Court of Claims attempts to confer upon Congress a power which the Supreme Court has decided that Congress does not possess.

"Congress can neither limit the effect of his par-
"don *nor exclude from its exercise any class of of-*
"*fenders.*"

Ex parte Garland 4 *Wal.*

When therefore the Court of Claims says that the President can only pardon disabilities imposed upon those owing allegiance, but cannot pardon disabilities imposed upon those who do not owe allegiance, that Court is attempting to grant to Congress a new power, the power to create a class of offenders whom the President's pardon cannot reach; a power disallowed by the Supreme Court and in direct opposition to the settled law, so concisely stated by Rawle, and reiterated by the various Attorneys General, that "the pardoning power is as extensive as "the punishing power."

Rawle on the Constitution, chap. XVII.

The question thus decided by the Court of Claims is not whether the President's Proclamation does or does not by its terms attempt to include such cases as the one at bar, but rests upon the proposition, which baldly stated is this—Statutory offenses against the United States, by non-resident aliens, and the consequent penalties or disabilities, cannot under any circumstances, either in time of peace or in time of war, be pardoned by the President. A limitation hitherto unknown is thus engrafted upon the President's prerogative. When penalties are imposed a new inquiry must be made. The broad and unqualified language of the Constitution is to be cut down by the interpolation of a new element. Henceforth the question of the allegiance or non-allegiance of the offender is to be made a

condition precedent to the exercise of that power which is justly termed "a benign act of grace."

A few examples are the best reply to this allegiance or non-allegiance theory.

If the power to pardon is coextensive with the power to punish, then, according to this new theory of the Court of Claims, the power of Congress to inflict punishment must be limited to those owing allegiance to the United States; but if this were so it would be impossible to give effect to the clause in the Constitution granting to Congress the power to "define and punish piracies committed upon the high seas, and offences against the law of nations."

Unless Congress can punish those who do not owe allegiance, it must follow that pirates, who own no country, could rove the seas with impunity, and blockade, without fear, every port in the country. This question was long ago settled by Marshall, C. J., in *United States vs. Klintock*. 5 *Wheat*, 154, where it is held, that the Act of April, 1790, defining and punishing piracy, extends both to citizens and to foreigners on board a piratical vessel—that is, it extends to and punishes persons not owing allegiance to the United States or to any one else. But further still, it was held by *Marshall, C. J.*, in *United States vs. Palmer*, 3 *Wheat*, 610, that Congress has the power to punish acts of piracy committed upon foreigners by *citizens* of a foreign country in foreign vessels—that is, Congress can punish the acts of those who owe allegiance to a foreign government, the only question being whether it choses to include such persons within the language of the statute. If, then, Congress can thus punish *all* pirates, is the President's power of pardon to turn upon the question of their allegiance.

In these piracy cases *Marshall, C. J.*, said, that the question was not as to the power of Congress to

impose the penalty on one who did not owe allegiance, and had not offended against the United States, but simply whether the language of the Act showed that the legislature had enacted the law. He said: "The question whether this Act extended farther than to American citizens, or to persons on board American vessels, or to offenses against citizens of the United States, is not without its difficulties. The Constitution having conferred upon Congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates *although they may be foreigners and may have committed no particular offense against the United States.*

"The only question is, has the legislature enacted such a law? Do the words of the Act authorize the Courts of the Union to inflict its penalties on persons who are not citizens of the United States nor sailing under their flag nor offending particularly against them."

United States vs. Palmer, 3 *Wheaton.*

In the case at bar there is no room for construction as to what Congress enacted.

Not only is the penalty imposed, but the classes of persons to whom it is to apply, are enumerated, so as to leave no room for doubt. Disability is put not only upon those who owe allegiance, but whether citizens or not, if they have done certain acts, they are expressly brought within the same category, thus shutting out all possible misconstruction of the sweeping nature of the Act.

Again: The Act of Congress, Aug. 11th, 1856, to punish forgery and perjury abroad, before consular officers, is not confined to persons owing allegiance to the United States but includes aliens as well.

Wharton says:

"But can a State punish aliens for offenses committed against it abroad? Such jurisdiction is expressly claimed by the United States in cases of perjury and forgery before its consular officers by aliens."

Again: Suppose Congress imposes a penalty for a breach of its revenue laws and they are violated at the same time by a citizen and by a non-resident alien. The Government proceeds to enforce the penalty against the property of both when the President interferes and grants a pardon. Can the effect of this pardon depend upon the allegiance or non-allegiance of the parties proceeded against? Will it remit the penalty or fine imposed upon the citizen leaving that imposed upon the alien in full force?

No authority can be found for any such limitation. The President's power of pardon in revenue cases has never been questioned.

"Instances of the exercise of this power (of pardon) by the President in remitting fines and penalties (in revenue cases) have repeatedly occurred, and their obligatory force has never been questioned."

II.—Story on Const. § 1504 *note,*

In the case at bar, the petitioner Collie, by appearing in Court, accepted the jurisdiction of the United States. The Court in which he appeared has decided that he committed a prohibited act, that of voluntarily aiding rebellion, which act, whether by citizen or alien, Congress had made an offense against the United States punishable by disability.

Collie having thus rendered himself amenable to disability under a law of the United States, having accepted the jurisdiction, and having been punished accordingly, his case cannot be distinguished from the others, and must fall within the President's power to pardon unless the novel doctrine of the Court of Claims is law, that the exercise of this

power to pardon depends upon the allegiance or non-allegiance of him, whom in spite of his non-allegiance, Congress has seen fit to punish.

THIRD POINT.

The language of the President's proclamation of pardon includes the claimant within its terms.

If, as we have shown, the President had the power to remove by his pardon any disability imposed by Congress, without regard to the status of the individual, whether he did, or did not owe allegiance to the United States, then Collie's disability was removed by the last amnesty proclamation.

The pardon and amnesty granted is as follows:

"Now therefore, be it known that I, Andrew Johnson, President of the United States, by virtue of the power and authority in me vested by the Constitution, and in the name of the sovereign people of the United States, do hereby proclaim and declare unconditionally, and without reservation, to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges and immunities under the Constitution and the laws which have been made in pursuance thereof."

15 *U. S. Stat. at large, Appendix* 15.

The history of these successive proclamations and the language in which they are couched, show that each was more comprehensive than its predecessor, and that the last was intended to do away with any further special pardons, to cover every conceivable

case, and to include each and every person who could by any possibility stand in need of, or be reached by amnesty. It was the final and crowning act by which the last trace of disability incurred, whether directly or indirectly, by reason of the rebellion was removed and forever blotted out. Previous proclamations had been restricted and thus special pardons required for individual cases. Thus a special pardon was at the request of Mr. John Bright, issued to an alien, one of the parties convicted in the Greathouse case, because being a British subject, he could not properly take the required oath of allegiance to the United States. By the last proclamation all such restrictions are removed. It is framed to meet every case. The President there grants a pardon couched in language so broad that literally *all* persons must be deemed within its scope.

The proclamation refers in the most general terms to "*all persons* who directly *or indirectly* participated in the late insurrection."

Its whole tone and import is amnesty, forgiveness and oblivion, full, free and unrestricted, for acts of direct or indirect participation in the Rebellion. Its sole purpose, to relieve from the consequences of such acts all persons who, by being directly or indirectly implicated, had thereby incurred any penalty, be it liability to personal punishment, confiscation of property, or any disability, which it was in the power of the United States to impose.

If by the use of any language it was possible for the President to pardon Collie, and remove his disability, such was the effect of this proclamation.

True, Collie was not guilty of treason against the United States, but the pardon is expressly worded to cover cases where no liability for treason has been incurred. If the theory of the Goverment in this case is maintainable, other acts of direct or indirect implication in giving aid to rebellion, besides those

involving the offense of treason had been deemed by Congress offenses against the United States, and a consequent disability imposed as the penalty.

To reach every such case of disability, something more was needed than a pardon for treason alone. Accordingly, by this proclamation, full pardon and amnesty is granted for another offense against the United States, an offense nowhere defined and limited, except that it is something other than treason, and in its language so general and comprehensive as to include every giving of "aid and comfort to rebellion," and "every act of voluntarily aiding, abetting or giving assistance to rebellion." All these come within the offense of "adhering to the enemies of the United States during the late civil war," an offense which the President in his proclamation treats as something distinct and apart from treason.

A pardon is granted for two offenses: first, treason; second, adhering to the enemies of the United States during the late civil war.

The Constitution of the United States defines the crime of treason to be and consist "only in levying war against them, or *in adhering to their enemies*, giving them aid and comfort."

Why was the offense "adhering to their enemies" superadded to the offense of treason when it would appear to be included *ex vi termini* in treason itself? The very broad language indicating the persons to whom the proclamation is to apply furnishes an answer to this. So far as citizens of the United States and domiciled aliens were concerned, it was enough to pardon them for treason, because that included adherence to the enemies of the United States; by persons who owed allegiance, but when we include *all and every person who directly or indirectly participated in the late insurrection or rebellion*, other classes are brought in, who owed no allegiance and whose offense would not be included in the term treason, who did not commit treason, but who,

by adhering to the enemies of the United States, and giving them aid and comfort, had been deprived of their property or fallen under disabilities. Among these are aliens whose property was taken and restitution cut off by the Act of Congress imposing a disability to assert their rights, and it was to reach them, among others, that this additional expression pardoning those who had given their adherence to the enemies of the United States was used. This proclamation, therefore, not only pardons all those who committed treason under the technical definition of the term given by the Constitution, but goes further and gives full pardon and amnesty to all who adhered to the enemies of the United States during the late civil war.

This is the very offense which aliens committed. If then these words have any meaning, and to hold that they have not would be to violate a fundamental principle of construction, we must give them this effect.

If the President had drafted his proclamation originally as a pardon for treason alone, and had then decided to make it general enough to include just such a case as that of the present claimant, what other language could he have used unless, indeed, Collie had been called by name. If the President had read the statutes imposing the disability he wished to remove, and had copied their language into his proclamation by not only pardoning treason, but granting a full pardon and amnesty for the offense of "giving aid and comfort to the rebellion," or of "voluntarily aiding, abetting or giving encouragement to rebellion against the Government," the intent of the proclamation to remove Collie's disability could not have been doubted, and such effect would then necessarily be given to it unless the pardon itself were decided to be ineffectual, because the President cannot remove a disability *imposed by Congress* upon a non-resident alien.

In *Carlisle's case*, 16, *Wal. p.* 155, it is said:

"Such being the established doctrine the claimants here were amenable to the laws of the United States prescribing punishment for treason *and for giving aid and comfort to rebellion.*

They were as domiciled aliens in the country prior to the rebellion under the obligation of fidelity and obedience to the government of the United States. They subsequently took their lot with the insurgents, and would be subject like them to punishment under the laws they violated but for the proclamation of the President of December 25th, 1868.

That proclamation, in its comprehensive terms, includes them *and all others in like situation.*"

What is meant by these words "all others in like situation?" Those, of course, who are subject to punishment under the laws of the United States.

The claimants in Carlisle's Case were amenable to the laws prescribing punishment for treason, and also for giving aid and comfort to rebellion. But is not Collie one of those others "in a like situation" if he too has made himself amenable to any Act of Congress imposing upon him a disability and consequent virtual confiscation of his property *for giving aid and comfort to rebellion*, the very words in which his offense is described in the captured and abandoned Property Act?

By this act his rights of property were taken away. His person could not be reached, but his property could.

In Carlisle's Case the Court says: "After these repeated adjudications it must be regarded as settled in this Court that the pardon of the President, whether granted by special letters or by general proclamation, relieves claimants of the proceeds of captured and abandoned property from the consequences of participation in the rebellion, and from the necessity of establishing their loyalty in order to prosecute their claims.

"This result follows whether we regard the pardon as effacing the offense, blotting it out, in the language of the cases as, though it had never existed, or regard persons pardoned as necessarily excepted from the general language of the act, which requires claimants to make proof of their adhesion during the rebellion to the United States. It is not to be supposed that Congress intended by the general language of the act to encroach upon any of the prerogatives of the President, and especially that benign prerogative of mercy which lies in the pardoning power. It is more reasonable to conclude that claimants, *restored to their rights of property* by the pardon of the President, were not in contemplation of Congress in passing the act, and were not intended to be embraced by the requirement in question."

p. 158.

Here then the pardon of the President is said by the Supreme Court to restore the claimants to their property rights.

Then their property rights must have been taken away by the Captured and Abandoned Property Act. Why were their property rights taken away? For giving aid and comfort to rebellion. Why are Collie's property rights taken away? For giving aid and comfort to rebellion. What is pardoned by the President? Treason, *and giving aid and comfort to rebellion*, with restoration of all *rights*, privileges and immunities under the Constitution and the laws which have been passed in pursuance thereof.

In point of fact, the President's words are more comprehensive than if he had quoted the statutory phrases. For certainly the giving of aid and comfort, or voluntarily aiding and abetting rebellion which are the statutory offenses for which disability is supposed to be imposed, are included in the general offense of "adhering to the enemies of the United States during the late civil war.

But says Richardson, J. :

"The claimant, instead of demanding *rights* under the international law comes here seeking *privileges* under the local laws," &c.

If by the captured and abandoned property act his rights of property were taken away, then, by the pardon, those property rights are restored to claimants, and Mr. Collie comes demanding a right to the possession of the property held by the Government as trustee for him.

In U. S. vs. Klein, 13 *Wal.*, 144,

The Chief Justice, in delivering the opinion of the Court, says:

" It was urged in argument that the right to sue the Government in the Court of Claims is a matter of favor, but this seems not entirely accurate. *It is as much the duty of the Government as of individuals to fulfil its obligations.*

In this case Miller, J., dissented. And, in his dissenting opinion, says of the opinion of the Court: "If I understand the present opinion, it maintains that the Government, in taking possession of this property and selling it, became the trustee of all the former owners, whether loyal or disloyal, and holds it for the latter until pardoned by the President or until Congress orders it to be restored to him."

In *Sprott vs. The United States*, 20 *Wal.*, 470, Field, J., in his opinion referring to Klein's case, says :

" In the case of the United States *vs.* Klein, this Court had occasion to consider the rights of property as affected by the war in the hands of citizens engaged in hostilities against the United States, and it held, *after mature consideration*, that the effect of the Act of Congress of March 12th, 1863, to provide for the collection of captured and abandoned property in insurrectionary districts, under which the present action is brought, is not to confiscate, or in

any case, absolutely divest the property of the original owner, even though disloyal, and that by the seizure the Government constituted itself a trustee for those, who, by that act, were declared entitled, or might thereafter be recognized, as entitled to the proceeds."

Klein's case settles this point, and is the unquestioned law to-day.

In *Haycraft vs. U. S.*, 22 *Wal.*, the seizure of the property was held not to be confiscation in the particular case, because *when the property was taken suitable means of redress were offered, but the claimant neglected to avail himself of them.*

The Chief Justice says:

"There is here no question of confiscation. The title of the United States, whatever may be the rights it carries with it, is by authorized capture or appropriation of enemies property. But the same statute which authorized the capture gave a right to certain persons to demand and receive a restoration of their property taken. Coupled with the right to demand, was a provision for the remedy by which it was to be enforced. Both the right and the remedy are, therefore, created by the same statute, and, in such cases, the remedy provided is exclusive of all others.

The claimant, in this case, *neglected to avail himself of the remedy provided*, and, consequently, he is now without any."

So the Chief Justice in

Lamar vs. Brown, 2 *Otto* 195, says:

"If the owner or claimant appearing there (*i. e.*, in Court of Claims,) had been loyal, and his suit was commenced in time *he was entitled* to a judgment restoring him to the possession of that which represented his property in the National Treasury."

There can be no question of Collies' right to come

into the Court of Claims as one of a general class upon whom this right has been conferred.

In U. S. vs. O'Keefe, 11 *Wal.* 184.

Davis, *J.*, says:

"Evidently Congress meant to confer on the British subject the right to sue in the Court of Claims under the act relating to captured and abandoned property."

The case then resolves itself into this—Either Collie was pardoned by this proclamation for his acts of adhering to the enemies of the United States, in consequence of which he was put under disability by Congress, or else the President's pardon was ineffectual in his case, not because Collie does not come within its terms but because this constitutional prerogative of pardon in every case, in peace as well as in war, is limited and restricted in its operation to those statutory offenders who owe allegiance to the United States, and cannot, under any conceivable circumstances, for any conceivable act, or to relieve against any possible fine, forfeiture or disability, be granted to a non-resident alien.

FOURTH POINT.

The President's proclamation granting full pardon and amnesty to all persons directly or indirectly implicated in the Rebellion will not receive a narrow and restricted application if its language can fairly be interpreted to cover all cases of disability for acts connected with the Rebellion.

Lord Coke says, a general pardon shall be expounded most strongly against the King,

See 5 *Comyns Digest* 242.

If it be suggested that the statute passed early in the war prescribing punishment for giving aid and

comfort to rebellion, rendered it doubtful whether the rebels had been guilty of treason, or only of a lesser offense, and the President's proclamation was framed so as to cover the cases if it should be decided that the offenses, for which punishment was prescribed by the Act of Congress, did not constitute the crime of treason, and accordingly that the pardon granted for "adhering to the enemies of the United States" was inserted merely with a view to meet this contingency, and not to embrace *all* who, by reason of their acts during the rebellion had come under disability by Act of Congress and might need to invoke the pardon; it is sufficient to say that such a limited construction of the classes of persons whose acts brought them under a disability does not accord with the comprehensive language of the pardon itself.

It is granted to *all* persons directly or indirectly implicated in the Rebellion. And can it be said that Collie was not directly or indirectly implicated in the Rebellion when Congress imposed a disability upon him in case it should appear that he voluntarily aided and abetted or gave encouragement to rebellion?

Besides the very fact that the president foreseeing that a pardon for the offense of treason alone would not cover all cases, undertook to pardon those who though directly or indirectly implicated in rebellion had not been guilty of treason, is proof that he intended to include just such cases as this. It cannot be supposed that the words used have no meaning, and it was perfectly well settled then that every resident who was directly or indirectly implicated in the Rebellion was guilty of treason. If, then, the words were used designedly, and to suppose otherwise would be to violate a fundamental principle of construction, to what can they be applied unless to remove just such disabilities as those imposed by Congress upon Collie and others whose right to get

back their property held by the United States in trust had been taken away.

The language of the proclamation drew the distinction between "treason" and "adhering to the enemies of the United States," viz: Treason consisted of so adhering by those who owed allegiance, and the words "and adhering to the enemies of the United States," applied to those who had so adhered, but, not owing allegiance, could not be guilty of treason.

It was not an open question when this proclamation was issued in 1868, whether the various acts in aid of rebellion for which punishment in the shape of imprisonment or fine was prescribed by the new statute of Congress, did or did not constitute the crime of treason.

As early as 1863, Mr. Justice Field, said in a case of an indictment under the new statute :

"We are unable to conceive of any act there des-
"ignated which would not constitute treason, ex-
"cept, perhaps as suggested by my associate that
"of inciting to a rebellion * * * * *

"Looking at the act alone we conclude that Con-
"gress intended, 1st. to preserve the Act of 1790,
"which prescribes the penalty of death, in force for
"the prosecution and punishment of offenses com-
"mitted previous to July 22d, 1862 ; 2d. to punish
"treason thereafter committed with death or fine
"and imprisonment, in the discretion of the Court,
"unless the treason consist in engaging in or assist-
"ing a rebellion or insurrection against the author-
"ity of the United States or the laws thereof, in
"which case the death penalty is to be abandoned
"and a less penalty inflicted * * * *

"*The defendants are therefore in fact on trial for*
"*treason.*"

As, therefore, all who owed allegiance to the United States were guilty of treason, if directly or indirectly implicated in rebellion, the President

must have intended to include, in his pardon, those who, while not under allegiance, and consequently not guilty of treason, by their acts had become implicated in rebellion, so far as to come under the disabilities imposed by Congress upon all alike.

In fine every intendment is in favor of the utmost freedom, and breadth in the scope of the proclamation.

Its language is not consistent with any intent to limit or restrict it in its operation. The words and phrases selected to be used in it are palpably selected to do away with the idea of any reservation whatever. The language, used, demonstrates an intention to wipe out every remembrance of the war, and to claim that any restriction or reservation lurked in the mind of the government law officer who drafted it, or of the President who issued it, would be an imputation, upon them, of an unworthy lack of candor and sincerity.

FIFTH POINT.

The judgment of the Court of claims should be reversed.

JAMES THOMSON,
Of Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

ALEX'R COLLIE'S TRUSTEE
vs.
THE UNITED STATES. } No. 781.

APPEAL FROM THE COURT OF CLAIMS.

DEFENDANTS' BRIEF.

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STATEMENT.

Condensing the findings of facts and inserting the purport of the additional findings in their proper connection, the case here presented is substantially this:

"Alexander Collie, on whose behalf this suit was instituted, and in the name of whose trustee in bankruptcy the same is prosecuted, was a subject of the Queen of Great Britain and Ireland, at one time residing in Manchester, England, as a member of the firm of Alexander Collie & Co., but in the years 1862, 1863, and 1864 residing and doing business, in his own name, in London, England, and *he has at no time been in the United States.*"

In the year 1862 the said Collie, and others jointly

interested with him in the undertaking, engaged in fitting out, lading, and sending steamships to run the blockade of the ports in States which were then in rebellion against the United States; and for about two years he and his associates continued engaged in that business, sending a large number of such vessels for that purpose, which succeeded many times in accomplishing their object, and carried into some of those ports general merchandise which was there sold, and also munitions of war, to wit, arms, gunpowder, armor-plates for war vessels, army clothing, cannon, shot, ammunition, and quartermaster and medical stores, which were purchased in England by said Collie or by agents of the so-called Confederate States of America, to whom, in aid of such purchases, the said Collie made large advances of money; and when said munitions of war were run into said ports they were delivered to the government of said Confederate States. The vessels so engaged in running the blockade took back from said ports to said Collie, in behalf of himself and associates, large quantities of cotton, partly received from said government in payment for the munitions of war and other things received from him, and partly bought for him by his agents in those States with moneys derived from the sales there of the cargoes of merchandise taken into said ports by the ships of said Collie. *The cotton, for the recovery of the proceeds of which this suit was brought, was purchased by said Collie's agent in the said Confederate States with moneys so derived.* (Record, 13; findings I and II; and page 44, last line, and top of page 45.)

October 1, 1863, Collie wrote to John White, special commissioner of the State of North Carolina, then in

England, expressing himself as "being desirous of aiding in any way in my power the government of your State in its present struggle; it seems to me that the time has come when this can be done very efficiently, and, with this view, I now ask your careful consideration of the following propositions: * * *

"First. To furnish, with as little delay as possible, four steamers, of the most suitable description for blockade-running, in each of which your State will own one-fourth interest, the other three-fourths being held by myself *and friends*.

"Second. To give up to the government of your State, when required, the entire inward carrying power of said steamers from the island to the Confederacy at a moderate rate, to be fixed hereafter.

"Third. That the government of your State be entitled to one-fourth space of the *outward* carrying power of each steamer, for cotton or other produce; and this arrangement will, I estimate, yield to your State funds sufficient to pay cost and all charges on *inward* cargo, each of its share of *outward* cargo, and (if cotton of good quality be sent out) a very large surplus will be left to the credit of your State at each trip." * * *

Upon the basis of the foregoing propositions an agreement was made October 27, 1863, between Collie and North Carolina, through its representative, for four steamers, with a stipulation "that one-fourth interest in each of these steamers will belong to the government of North Carolina, three-fourths owned by Alex. Collie *and friends*," the expenses and profits to be shared in that proportion. The object was declared to be to run in supplies "at a moderate rate of freight, and in regular quantities," and, "second, to *run out* regularly a quan-

tity of *cotton for the State*, to enable *it* to benefit from the very high prices ruling here [in England]; third, to reduce the risk of capture as much as possible by dividing the interest of the government over four or more steamers." The details of the arrangement are then stated, and they were carried into execution by the importation of supplies and exportation of cotton as contemplated. (Record, 14–16.) Collie's "friends," engaged with him in these adventures, owned jointly with him the three-fourths of these steamers of which North Carolina owned a quarter. (Record, 45, ¶ V.)

In 1863, Collie undertook to sell and did sell, for the State of North Carolina, large amounts of its obligations for the delivery of cotton, known as cotton-warrants, holding himself personally responsible to the purchasers for their payment, and receiving them for goods shipped by him to that State. (Record, 16, middle.)

June 13, 1864, Collie contracted with the Confederate government, through Colin J. McRae, its agent, to provide the Confederacy with "four large and powerful steamers" with the least possible delay; to procure for its use within six months, and ship as fast as practicable, £150,000 sterling of quartermaster's stores and £50,000 sterling of ordnance or medical stores. Omitting many details, the Confederate government agreed that immediately upon arrival it would claim and take all these supplies; to avoid payment of duties, no doubt. "*Fifty per cent. advance will be added to the English invoice*, and Alexander Collie, through his agent, will immediately receive in exchange cotton *at the rate of sixpence sterling a pound*," the cotton to be middling, compressed, packed, and delivered alongside the steamers. It was further

agreed that Collie might take out full cargoes of cotton in exchange for such supplies, "free from any other charge or restriction whatever beyond the *now existing* export tax of one-eighth of a cent per pound," and the like privilege was secured as to cotton or tobacco bought by Collie, and not thus procured by exchange, to the extent of one-tenth of the capacity of each steamer. (Record, 16, 17.)

One Crenshaw was jointly interested with Collie in three-quarters of these steamers, of which the Confederacy owned one quarter. (Record, 45, ¶. IV.)

These steamers, of which the Confederate States and North Carolina were part owners with Collie and others, "sailed under the English flag, and with English papers." (Record, 45, ¶¶ IX and X.)

Under the contract with the Confederate States, in 1863–'64, divers steamers were supplied, and importations of supplies and munitions of war for the Confederate government were run by them into Wilmington, and return-cargoes of cotton on account of that government and of said Collie, were run by them out of that port to England.

In March, 1864, the said Collie sent, *as a present to the Confederate authorities* at Wilmington, on one of his steamers engaged in running the blockade into that port, a Whitworth gun for field-service, with carriage, caisson, limbers, and all other customary appendages, together with a large quantity of shot of the proper caliber for the gun, in regard to which he wrote to the governor of North Carolina as follows:

"I have shipped on board the Edith *a new kind of gun* which is reported to be *particularly destructive*, and I

have to ask the authorities at Wilmington to accept it as a '*substitute*' for some of our people, who, but for our business, would have been doing business in another capacity."

This gun was received by the Confederate authorities in Wilmington and used in defense of that port, and in aiding the entry into it of blockade-running steamers, by repelling the vessels of the United States engaged in pursuing those steamers. (Record, 18.)

In the year 1864, the said Collie sent on one of his blockade-running vessels to the government of said Confederate States, as a gift from himself, two Whitworth guns, which were received by that government and used in its service. (*Ib.*)

In the same year the said Collie made a donation to that government of $30,000 to aid the needy and the suffering in the insurgent States, and more particularly those who had been made so through the war. (*Ib.*)

In the years 1862, 1863, and 1864, the said Collie for himself and "friends" through an agent in the insurgent States, sent out by him in 1862, purchased with money derived from sales of cargoes run through the blockade into ports in those States, in said Collie's steamers, 3,096 bales of upland cotton, and 1,757 bales of sea-island cotton; all of which was stored in Savannah at the time of the capture of that city by the military forces of the United States in December, 1864, and was there seized and taken by those forces, and thence shipped to New York, where it was sold by an agent of the United States, and the proceeds thereof, amounting to $944,297, were paid into the Treasury of the United States. (*Ib.*)

"The vessels for the adventures aforesaid were bought with funds partly provided by Alexander Collie & Co., and in part by his friends, who subscribed to them in shares of £500 each. The cargoes were in part procured in the same way, and in part by the shipment of the goods dealt in by the subscribers; *i. e.*, as to those cargoes not provided for the Confederate government and the State of North Carolina." (Record 45, ¶ VI.)

"The Giraffe, bought as the first vessel for Collie and others' second adventure, was sold to the Confederate government. *After* such sale, she was caused by Collie to be registered and documented as an English vessel." "After the sale of the Giraffe, prior to her delivery, and while so documented as an English vessel, and commanded and manned by an officer and crew put on board by Mr. Collie, there was carried in said vessel military and naval officers of the Confederacy, and cannon and ammunition for the Confederate government." (Record, 45, ¶¶ VII and VIII.)

Upon the foregoing facts the Court of Claims reached the

CONCLUSION OF LAW

"that the petition of the claimant should be dismissed" (Record, 18, bottom), and final judgment to that effect was entered accordingly. (Record, 46, folio 45.)

BRIEF.

This cause has been twice argued upon the evidence in the court below; and upon the question of granting a new trial there the distinguished counsel resisting the motion (Messrs. Evarts and McFarland), discussed the merits of the whole case *in extenso*. It is therefore supposed that substantially the same legal propositions will be now and here submitted, and in the same method as heretofore. Upon this assumption this brief is prepared in advance of that of the plaintiff in error, reserving for a supplement, or supplemental brief, if that is found necessary, whatever there may be occasion to say by way of reply to any new matter that may be advanced.

This course is adopted that the government may be ready to present the cause at the earliest convenience of the court and of counsel for the claimant; though it may possibly have the disadvantage of requiring us to travel twice over the whole subject of dispute.

I.

The first proposition elaborated by claimant's counsel in a dozen pages of their brief below, is that the contest between the United States and those States and organizations which repudiated and denied the Federal authority, was a geographical, territorial, civil war, with all the rights and incidents of public warfare, entitling both parties to exercise the rights and powers, and subjecting both to the duties and obligations of belligerents.

Geographically the hostile lines were not coincident with those of the States; but as to its nature and incidents, wherever it did exist, we agree with claimant's counsel, making the existence of such a condition of affairs the foundation of our whole defence. We say there was a war, in which the United States had the right of belligerents; that, in the exercise of a belligerent right it captured, *jure belli*, the cotton which is here the subject of controversy; though we shall further claim that, as the rebellious territory and its inhabitants were subjected again to Federal laws and authority, sovereign rights were added to those of a belligerent; indeed, that such *rights* always existed.

As we all agree in conceding belligerent rights to the United States and to the Confederacy, it becomes useful to consider what those rights were, as to property found in hostile territory at the time of our regaining possession and re-occupying it.

Here we must distinguish between the admitted and lawful *right*, and the extent to which it is usually deemed *politic* to exercise it.

"First, however, we must see the old, primary rules of war, on the subject, *always remembering that the burden of proof as to any of them having been changed, lies on those who assert such a change to have taken place*, and remembering also that *the strict right to enforce an old rule as matter of positive law may survive, although its enforcement may have become unusual*, and may be now regarded as a harshness not consonant with the international comity, or even with the international moral law, which civilized States generally practice." * * *

"472. I have already stated that by the old, primitive laws of war all the goods and chattels of any and every member of a nation engaged in warfare become liable to seizure by any member of the hostile community; * * * that the immovable property of the conquered, whether public or private, passed to the conquering State, and that the conquering State acquired property over all booty taken in military operations. Such relaxations of these stern old rules as have been effected are of very modern date. Grotius quotes (and he admits the validity of) maxims of ancient writers as to the almost unlimited right which a belligerent acquires by the law of nations over members of the hostile State, even after resistance is ended. He afterward devotes great part of one of the most interesting chapters of his work to demonstrating that a good and humane conqueror, especially if he be a sincere Christian, will not avail himself of the full rights given to him by warfare; but *the existence of these rights is emphatically recognized.* Not to take up space by enumerating a host of similar authorities," &c, &c, &c. Creasy's First Platform of Internat. Law (Eng. ed., 1876), 496, §§471, 472, *et seq.*; Manning's Law of Nations, 127.

"Among these sovereign rights of war may be classed the right to attack and capture or destroy the persons and property of the enemy; to destroy his commerce; to despoil and plunder his territory; to levy contributions; and to put in practice against him every method known in civilized warfare, necessary to weaken him. Every nation at war with another is justifiable, by the general and strict law of nations, in seizing and confiscating all movable property of its enemy of any kind or nature whatsoever, wherever found, whether within its territory or not; but the general usage now is, not to touch private property on land without making compensation, *unless in special cases*," &c., &c. * * *

"This usage was adopted in the earlier stage of the Mexican war, * * * but was departed from and military contributions levied before the close of the war. *And it was notoriously departed from by the Army of the United States*, in every Southern State, *during the late civil war*, and the private property of the citizens, whether friendly or unfriendly to the government, was taken and appropriated to the uses of the Army, in most cases without any compensation. The departure from this usage would have justified the other belligerent—the Confederate States—in the adoption of a similar course, in regard to the property of any of the citizens of the United States residing out of the limits of the Confederacy," &c., &c. (Smith *vs.* Brazelton, 1 Heiskell, 59, 60, citing Vattel, 346 to 363, Book III, c. 8; 1 Kent, Lect. V, 90 to 101; 4 Kent, 90, 92, m.; Ware *vs.* Hylton, 3 Dallas, 199.) Not only was this right exercised by the Confederates in Pennsylvania, Kentucky, and elsewhere, but the Kentucky court of appeals held the taking of a horse in that State under Confederate

military authority to be "excusable as a lawful exercise of a belligerent right." (Price *vs.* Poynter, 1 Bush, 388.) Upon page 394 of that report, Professor Parsons is quoted as saying that the supposition that the laws of war have been so mitigated as to prevent the seizure of private property "is a mistake, according to all the authorities on the law of nations"; and it is said that "these authorities establish, as a part of the sovereign rights of war, belonging to all belligerents, the right to take private property in an enemy's country *to lessen the power of their adversary* or *to increase their own*, as a military necessity, of which the officer in command is to be the judge, *unless controlled by the supreme power at home.* But these belligerent rights are subject to modifications by the positive rules enacted by the sovereign power, which all the citizens and courts of such sovereign must observe." (1 Bush, 394, 395; Mrs. Alexander's Cotton, 2 Wall., 419, 420; Prize cases, 2 Black, 671, bottom; Brown *vs.* U. S., 8 Cranch, 122–3; Upton's Mar. Warfare (ed. of 1861), 87; Prof. John Norton Pomeroy in No. Am. Rev. for April, 1872, No. ccxxv, page 399.)

It will be seen that these authorities do not confine the right to those articles only which are needed for immediate military use; nor should it be so restricted upon principle. It is not confined to property belonging to one personally inimical, but (as will be more fully considered hereafter) applies to all which for any reason, is stamped with the impress of hostility.

The modifications spoken of in Price *vs.* Paynter, 1 Bush, 394, last two lines, are such as were made during the rebellion by the captured and abandoned property acts establishing those "rules concerning captures on

land" which the Constitution confers upon Congress the authority to make. This legislation was an exercise of that power. (Haycraft *vs.* United States, 22 Wall., 92.)

These statutes did not confer the belligerent right of capture, which existed independently of them, under public law, and prior to their enactment. To this effect is the quotation in the opinion of the supreme court of Tennessee, per Nelson, J., from the instructions issued by General Halleck to the officer commanding in that State: "As the commanding general in the field, you have the power to enforce all laws and usages of war, *however rigid and severe these may be* [italicized in the opinion], unless there be some act of Congress, regulation, order, or instruction forbidding or restricting such enforcement." (Smith *vs.* Brazleton, 1 Heiskell, 61; Mrs. Alexander's Cotton, 2 Wall., 404; Planters' Bank *vs.* Union Bank, 16 Wall., 496, bottom.) See also the opinion, per Swayne, J., in Coolidge *vs.* Guthrie, reported in 8 Am. Law Reg. (N. S.), 24, and essay of Hon. Wm. Lawrence upon "War Claims against the United States," in the Am. Law Reg. for May, 1874, vol. 13, new series, page 273, bottom; The Emulous, 1 Gall., 563, 582, and 583; Brown *vs.* United States, 8 Cranch, *149 and *151, near bottom, and 3 Curtis's Cond. Rep., Sup. Ct., 71, middle, and 73, [*154.] In this last-named case, the only difference between C. J. Marshall and those uniting with him (on the one hand) and Judge Story and his associate (on the other) was whether, by the mere act of declaring war, enemy's property *already in the country* became confiscable, or whether legislation was necessary to render it so; and, if the latter, whether the action previously had by Congress amounted to the requisite declaration of a purpose to confiscate *such* property.

Such being our lawful, belligerent right, we assert that it was here exercised, and that the cotton in question, so taken, was a lawful capture *jure belli*.

If not "liable to capture" because owned by a non-resident alien, the seizure was a tort, which would oust the jurisdiction of the Court of Claims; the only remedy in such cases being by a diplomatic claim presented to our government by that of Great Britain. (Gibbons *vs.* United States, 8 Wall., 269.) If lawfully captured, the captured and abandoned property act prescribes the sole remedy, which must be literally pursued. (Haycraft's case, 22 Wall., 92.)

But the petitioner properly proceeds upon the assumption that this cotton *was* liable to capture. (Haycraft's case, cited *supra*.) Property may be exposed to this liability by reason of its ownership, or from its nature and uses, *i. e.*, from its military character, or from a peculiar capability for furnishing military supplies and support, directly or by exchange. It may be liable by the recognized rules of ordinary warfare, or be made so by express legislation. This latter is the method usually pursued with relation to private property on land, and the one adopted by Congress in the passage of the captured and abandoned property acts. (Haycraft's case, *ubi sup.*, and other citations above and below given.)

These statutes base the liability to capture upon the *situs*, nature, and uses of the property, irrespective of the citizenship or alienage, loyalty, disloyalty, or neutrality, of its owner. (Mrs. Alexander's cotton, 2 Wall., 404, 420, 421; The Gray Jacket, 5 Wall., 369, bottom; Padelford's case, 9 Wall., 531; Miller *vs.* United States,

11 Wall., 305; Sprott's case, 20 Wall., 462; Haycraft's case, *ubi sup.;* Lamar *vs.* Brown, 92 U. S., 187; Dana's Wheat., § 256, n. 171.)

As we shall have occasion to show further on, so far from the right of the original seizure depending upon the character of the owner, he is, to a certain extent, impressed with the hostile character of the property by virtue of his ownership; especially where, as here, he acquired it after the commencement of hostilities. (1 Kent's Com., 74, and other authorities to be hereinafter cited.)

II.

This property being liable to capture and, therefore, lawfully captured, what rights in or to it did its capture vest in the captor, the United States?

We deem this inquiry important, because we dissent entirely from the position once announced in this cause by distinguished counsel (Mr. Evarts), that "the United States did not own this cotton, but was looking for an owner." On the contrary, we contend that the capture, *ipso facto*, devested entirely the title of the former owner, and vested the absolute right and entire title to the property in the United States. That it had this effect as to the specific bales of cotton can hardly be denied. They could not be replevied by the former owner from the agents or vendee of the government, nor would either be liable to the late proprietor for their value. (Lamar *vs.* Brown, 92 U. S., 187.) Such is always the effect of a capture. "All property captured belongs originally to the Crown; and individuals can acquire title thereto in no other manner than by grant from the Crown." Brown *vs.* United States, 8 Cranch, 131, per Story J., whose opinion *as to this point* is not a dissenting one, but a preliminary statement of admitted propositions of law, introductory to a discussion of the merits of the particular cause. *Vide* Prize cases, 2 Black, 671, middle, and 3 Phillimore's Int. Law (1st Eng. ed.), 139, where it is said that this opinion by Judge Story "really exhausts the argument and learning which belong to this subject."

"Prize," says Sir Wm. Scott, "is altogether a creature of the Crown. *No man has, or can have, any interest*

except what he takes as the mere gift of the Crown. Beyond the extent of that gift, he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. *The acquisitions of war belong exclusively to the Crown*, and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject. *Bello parta cedunt reipublicæ.* It is not to be supposed that this wise attribute of sovereignty was conferred without reason; it is given for the purpose assigned, that the power to whom it belongs to decide on peace or war may use it in the most beneficial manner for the purposes of both. A general presumption arising from these considerations is, that the government does not mean to divest itself of this universal attribute of sovereignty, conferred for such purposes, unless it is so clearly and unequivocally expressed." (The Elsebe, 5 C. Rob., *173, *181–2, and following pages; the Melomane, *Id.*, *41, *48; the Maria Francoise, 6 C. Rob., *282, *296, *et seq.;* the Thetis, 3 Hagg., *231, *q. v.*) In another cause, where property seized on land (though by a force sent from men-of-war) was in question, the same eminent judge remarked: "It may disencumber the question to consider who are in law the real proprietors of the species of property captured *jure belli;* and I have no hesitation in saying that the state is unquestionably so, *in all cases whatever.*" (The French Guiana, 2 Dodson, *151, *157; The Joseph, 1 Gall., 558; The Liverpool Hero, 2 Gall., 188, 189. Vattel, 365, book iii., ch. 9, § 164, and note 165, Chitty's ed.)

In the second English edition (1873) of Phillimore's International Law, that writer says: "CXXX.

"The maxim '*bello parta cedunt reipublicæ*' is recognized by all civilized States. In England all acquisitions of war belong to the sovereign, who represents the commonwealth. The sovereign is the fountain of *booty* and *prize*. The law on this subject has been laid down by Lord Stowell and by Lord Chancellor Brougham in a manner which leaves nothing to desire. The opinion of both of these men is given in the following extract from the judgment of Lord Brougham: 'That prize is clearly and distinctly the property of the Crown, that the sovereign in this country, the executive government in all countries, in whom is vested the power of levying the forces of the State and of making war and peace, is alone possessed of all property in prize, is a principle not to be disputed. It is equally incontestable that the Crown possesses this property *pleno jure* absolutely and wholly without control; that it may deal with it entirely at its pleasure, may keep it for its own use, may abandon or restore it to the enemy, or, finally, may distribute it in whole or in part among the persons instrumental in its capture, making that distribution according to whatever scheme, and under whatever regulations and conditions, it sees fit. It is equally clear, and it follows from the two former propositions, that the title of a party claiming prize must needs in all cases be the act of the Crown, by which the royal pleasure to grant the prize shall have been signified to the subject.' * * * * * 'But this, at all events, is clear, that when the Crown by an act of grace and bounty, parts, for certain purposes, and subject to certain modifications, with the property in prize, it by that act plainly signifies its in-

tention that the prize shall continue subject to the power of the Crown as it was before the act was done.'" (3 Phil. Int. Law, 209–212, § cxxx; Alexander *vs.* Duke of Wellington, 2 Russ. and Mylne, 11 Eng. Ch., 54.)

To whomsoever title is given, it is derived from the grace of the sovereign. (Vattel, book iii, ch. xv, § 229.)

Summing up the governmental methods of acquisition the Tennessee court said: "The title to *private* property may be acquired by capture from a public enemy, by purchase from the true owner, or by a taking under the right of eminent domain." (Taylor *vs.* N. & C. R. R. Co., 6 Coldwell, 649, bottom.)

The titles derived in the these three ways are properly stated as conferring the same rights.

The purpose of citing these copious extracts is not to support a well-known maxim of law, but to bring into prominence those expressions from which it is apparent that the only title from which the claimant can now derive any benefit must be solely that which he can deduce from or through the United States; and that this has no connection (*as title*) with the one he once obtained from those of whom he originally purchased the cotton. *That* title was extinguished by the capture. To be sure, the United States have chosen to say—having power to annex any condition they pleased— that they will show this favor to none except such as can prove an ownership antecedent to the capture; but that a claimant was such owner constitutes no claim, unless accompanied by proof of those other facts which satisfy the requirements of the donating statute. These remarks are offered as a reply to all suggestions about the United States taking, having, and withholding the claimant's property.

At a former hearing, it was said that this cotton was not subject to confiscation. This is not quite correct. It was subject to capture; and, as we have just shown, *capture is confiscation*, certainly as to all seizures on land, where the title passes at once to the captor's government, without adjudication. (Lamar *vs.* Brown, 92 U. S., 195.)

Upon capture, the property became, *ipso facto*, that of the United States. As such it was sold, and title given to the purchaser, good against all the world. Of mere grace, Congress permits the former owner to receive the net proceeds, on proof of such previous ownership, of his right to the proceeds, and that he has never given aid or comfort to the rebellion. These preliminary proofs are conditions annexed to the grant. Congress might have annexed other conditions—might have given the proceeds, *per capita* or otherwise, to the soldiers or persons making the seizure, on proof thereof, or of any particular term or kind of service, &c., &c., &c.

We are aware that, from the language employed by the Supreme Court in Klein's case (13 Wall., 138), it has been common to speak as though the United States had been declared a trustee of *all* the proceeds of captured cotton, for *every* person who had once been an owner; but a careful examination and comparison of the several decisions show that this is not the case. In United States *vs.* Anderson, 9 Wall., 65, the expression of a trusteeship was first casually used, without intending anything more than to indicate the purpose of this legislation.

That its use was casual is evident from the inaccuracy of the preceding sentence, in which the court say, "for

all the property obtained in this manner, could, by *proper proceedings*, have been appropriated to the necessities of the war." We have already seen that no *judicial* proceedings, at least, were requisite to authorize its use for any purpose to which the captor government might choose to put it. (Lamar *vs.* Brown, 92 U. S., 195, and other cases cited *ante.*) The learned judge then proceeds to say, "But Congress did not think proper to do this. In a spirit of liberality, it constituted the government a trustee for SO MUCH of this property as belonged to the faithful Southern people," &c. (9 Wall., 65.) So in another case in the same volume the government is called the trustee *of one who is able to bring himself within the terms of the act.* (United States *vs.* Padelford, 9 Wall., 543.) In Wylie's case, 6 C. Cls. R., 298, it is said that this statute was a wise and beneficent measure, "imposing on the Government a trust *in favor of its loyal citizens,*" and that it came "to preserve *for the loyal citizen* all the substantial rights that equity could protect." Even in Klein's case the court limit the trusteeship to loyal men and those "who though then hostile, might become loyal"; but Miller and Bradley, JJ., dissented, because they thought the previous decisions of the court correctly limited the trust to those loyal at the time of capture. (13 Wall., 149, 150.) In Haycraft's case (22 Wall., 92, 94), the Supreme Court reject the idea of a general trust, originating at the time of capture, "for the use and benefit of the owner, whoever he may be"; and say that if the owner seasonably file his claim and make the requisite "proof of his ownership and loyalty," &c., he might receive the money realized by the United States from the sale of his property. "*That expresses all there is of the trust* or the remedy provided."

That is to say, we are not to assume a trust, and then construe the statute to conform to our ideas of the duty of a trustee toward his *cestui que trust*, but the language of the statute creates and expresses all there is of the trust; and it is not until the statutory proof is made that any trust arises.

Evidently, *all* captured cotton, and its proceeds, were not held in trust; nor was *every* owner entitled to recognition, for this court has refused restitution to many of them; but only a portion of the cotton, and some of its owners, were within the purview of the statute. *Prima facie*, all the cotton belongs absolutely to the United States, as taken from the enemy. The burden of proving the contrary rests on the claimant, and no trust arises until such proof is made.

III.

Assuming the existence of belligerent rights, including that of capture, with all its legal consequences, no occasion arises upon this record to dispute or discuss the authority of the United States—in the course of, and to accomplish, military operations—to take within belligerent territory the private property of their own citizens, patriotic or traitorous, whether the owners were domiciled in legal or rebellious States. But it is contended by the claimant that no such right existed as to property found by our armed forces during the war within Confederate limits, title thereto having been acquired by the citizen of a neutral country (resident at home) *after* the war became flagrant, by means of and as the fruit of a contraband trade carried on through our blockade.

The position thus assumed suggests several inquiries.

First. Is a non-resident alien *conclusively* presumed to be neutral because his country is so, or is this only a *prima-facie* presumption, to be rebutted by proof of the commission of acts of hostility, making him in fact an adherent of our enemies?

In other words, if our army finds in a captured city the property of a foreigner who, by gift of guns and otherwise, has promoted the war against us (though never personally within the hostile camp), can it properly be treated as that of an enemy, or must it be considered as belonging to a neutral, although acquired as aforesaid, *flagrante bello*, and that particular species of property had been denounced as proper subject of capture *jure belli*?

Second. After a particular species of property has

become liable to capture, can *any* mere transfer of title have effect to exempt it from this liability if found and taken within hostile territory by our army?

In other words, can or cannot *the article itself* be so impressed with a hostile character as to make it properly subject to seizure, if there found, irrespective of the animus, nationality, or residence of the owner?

N. B.—The difference between these two questions is, that the first asks whether the property can be affected by the hostile acts and disposition of the owner, while the second suggests whether the peculiar character of the article itself subjects it to capture within hostile territory, even though belonging to a neutral.

The former relates to the status of the *person;* the latter to that of the *thing.*

Third. Confident that these inquiries—as to the effect of a hostile character, whether attaching to the individual or the merchandise—would both properly be answered by an affirmation of the right of capture if the goods were found upon the ocean, we are led to ask whether the power to seize is different—less or greater—within hostile territory than that lawfully exercised upon the high seas?

Fourth. Independently of the effect his dealings might have in determining whether the owner was to be deemed *personally* neutral or an enemy, and of the liability of *all* cotton to capture generally, did the cotton which is the subject of this suit stand any differently in respect to its liability to capture, because it represented supplies run through our blockade, or because it was the equivalent received for munitions of war, and was the fruits of a partnership entered into by Collie and his friends with

the Confederacy and North Carolina for the supply of such munitions, &c., through our blockade?

The relevancy of these last inquiries will be better seen by comparing the present findings of fact with those found at the former trial. By those first filed it was intimated that this cotton was bought by the petitioner's agent (Andrae), at Wilmington, N. C., and paid for by his drafts on Collie for funds. (Record 3, near bottom.) It is now explicitly stated that it was "purchased with money derived from sales of cargoes run through the blockade," &c. (Record 18, finding III.)

In the former case the question would be whether property not directly connected with dealings with the enemy through our blockade could be seized, and these transactions set up to bar a recovery; whereas it now presents this additional feature, that this very property is implicated in, represents, and is the fruit of these enterprises.

In the opinion rendered by the Court of Claims upon the first trial, a discrimination in Collie's favor is intimated upon the ground that his importations were of articles "*not* material of war" (Record 4, near top); but as the evidence adduced at the second hearing led to an opposite statement of fact, it has become immaterial to consider whether this distinction is well or ill founded.

Fifth. Does it make any difference that the seizure was made within territory of which the United States were the rightful sovereign?

I. Can a non-resident alien, by reason of *any* acts of his, be deemed an enemy personally, or as to any of his property which is of a character and is found in a situa-

tion to make it liable to capture if hostile? If so, it will be quite apparent that Collie's course was the most inimical to us that any individual domiciled abroad could adopt.

Can he be considered *personally* hostile?

In Miller *v.* United States (11 Wall., 311, 312), after demonstrating that "even in foreign wars, persons may be enemies who are not inhabitants of the enemy's territory," this court say: "Still less is it true that the laws of nations have defined who, in the case of a *civil* war, are to be regarded and may be treated as enemies. Clearly, however, those must be considered such who, though subjects or citizens of the lawful government, are residents of the territory under the power or control of the party resisting that government. Thus much may be gathered from the Prize Cases. And *why not all who act with that party?* Have they not voluntarily subjected themselves to that party; identified themselves with it? And is it not as important to take from them the sinews of war, their property, as it is to confiscate the property of rebel enemies, resident within the rebel territory? It is hard to conceive of any reason for confiscating the property of one class that does not equally justify confiscating the property of the other. We have already said that *no recognized usage of nations excludes from the category of enemies those who act with, or aid and abet and give comfort to, enemies*, whether foreign or domestic, *though they may not be residents of enemy's territory.*" (11 Wall., 311, 312.)

The opinion (per Strong, J.) then goes on to show that when our Constitution was framed, immediately after the revolutionary struggle, it was "the general under-

standing that aiders and abettors of the public enemy were themselves enemies, and, hence, that their property might be lawfully confiscated." (See Prize Cases, 2 Black, 674, middle.)

In Kennett *vs.* Chambers, Taney, C. J., declares that the appellants "*made themselves parties to the war* [between Texas and Mexico] by furnishing means to a general of the Texan army for the avowed purpose of aiding and assisting him in his military operations." (14 Howard, 48, 49.) The aid, in the form of notes for $12,500, was rendered General Chambers at Cincinnati.

What the Kentucky court said of a nation or organization is true also of the individual citizen; "that the character of belligerency was not so much a principle as a *fact*." (1 Bush, 392, top.)

Twiss says: "That an individual citizen of a neutral state should be liable to be treated as an adherent of a belligerent power, while the nation itself of which he is a member maintains neutrality, presents no difficulty. War is a great trial of right, in which all mankind are entitled to take part, if their sense of justice prompts them to side with either party, or their sense of danger compels them to array themselves against either party." (2 Twiss's Law of Nations, 435, § 215.)

"Now the duties that the law of nations imposes on the neutral merchant flow exactly from the same principle as those that attach on the neutral government. Where he supplies to the enemy munitions or other articles contraband of war, or relieves with provisions, or otherwise, a blockaded port, although his motives may be different, his moral delinquency is precisely the same. By these acts *he makes himself personally a party*

to the war, in which as a neutral he had no right to engage, *and his property is justly treated as that of an enemy.*" (1 Duer on Ins., 754, 755; Levi's Intern. Law, Introduc., xlv and xlvi; 1 Chitty Com. Law, 395; Whiting's War Powers under the Const., 337, § 1; Chitty's Vattel, 328, book iii, ch. 6, p. 96 and 331, § 102.)

"It is a settled principle that *traffic alone*, independent of residence, will sometimes confer a hostile character on the individual." (3 Philli. Int. Law, 728, cited *infra*.)

Mr. Collie's counsel intimate that these donations of guns and money were not mere gifts, but were thrown in to influence, if not as a part of, business transactions. Grant it; and this does not change their character. They were not, of themselves, acts of *trade*. If done to influence trade, they bore the same relation to it that *motive* does to *consideration* in matters of contract. (Philpot *vs.* Gruniger, 14 Wall., 570; Thomas *vs.* Thomas, 2 Ad. & El., 859, being 2 Q. B., 949.) The hope of continuing profitable intercourse was the *motive* of the donations, but there was no *consideration* given in return for the money and guns; hence, these were *not trade dealings*, which was all Mr. Evarts claimed—or could claim—the neutral was privileged to enjoy.

Again, the purpose was not merely to secure the right to trade; for these beleagured people were glad to buy of whomsoever could supply their pressing necessities. It was to induce a continuance of *privileged* trade, of guaranteed profits, of exemption from export duty; and to obtain it by creating the feeling that these peculiar privileges might properly be extended to one who had shown himself peculiarly in sympathy with that party in the contest and most ready to extend material

aid of money and guns "in lieu of personal services," which he regretted circumstances would not permit him to tender.

If Mr. Collie can be deemed personally an enemy generally, then all his property, found at sea, or within the insurgent lines, is hostile property, and may, either by legislation or the laws of war, be taken as a lawful capture *jure belli*.

We have treated this question as though England were to be deemed strictly a neutral country. We do not wish, however, to lose sight of the fact—more material in another connection, perhaps, than here—that, owing to the peculiarity of our civil war, in which we superadded belligerent to sovereign rights, she was placed in an attitude assimilated to neutrality, rather than in that of strict and technical neutrality.

The application we shall make of this will be to deny, to the full extent claimed by Collie's counsel, that "in so far as trade and intercourse with neutral countries were concerned, the Confederate States, in the eye of international law, were invested with the character of a a sovereign community."

II. At all events, whether an enemy generally or not, Collie is to be deemed and treated as an enemy *sub modo*—as to this property—which is all that concerns us here. (San José Indiano, 2 Gall, 268, 285–287; 1 Kent's Com., *80; 30 Hhds. Sugar *vs.* Boyle, 7 Cranch, 199; The Mary Clinton, Blatchfd., Pr. Cas., 560; Halleck's Int. Law, 715, § 25, and 720, § 3; Whiting's War Powers under the Const., 346, § 6; 356–7; and authorities *passim*.

In the opening paragraph of Lecture IV, Judge Kent observes that hostility may attach to property of a particular description: "This hostile character, in a commercial view, or one limited *to certain intents and purposes* only, will attach in consequence of having possessions in the territory of the enemy, or *by maintaining a commercial establishment there*," &c. (1 Kent Com., *74.) That is to say, not only is that property liable to capture, but its owner—by his relation to it and so far as that extends—is also impressed with the character of an enemy. The learned commentator continues: "It was considered by Sir William Scott, in the cases of the Phenix (5 C. Rob., 21), and of the Vrow Anna (*Id.*, 161), to be a fixed principle of maritime law, that the possession of the soil *impressed upon the owner* the character of the country, wherever the local residence of the owner might be. *The produce of a hostile soil bears a hostile character for the purpose of capture*, and is the legitimate subject of prize when taken in a course of transportation to any other country. The enemy's lands are supposed to be a great source of his wealth, and, perhaps, the most solid foundation of his power; and whoever owns or possesses lands in the enemy's country, though he may in fact reside elsewhere, and be in every other respect a neutral or friend, must be taken to have incorporated himself with the nation, so far as he is a holder of the soil; and *the produce of that soil is held to be enemy's property, independent of the personal residence or occupation of the owner.* The reasonableness of this principle will be acceded to by all maritime nations; and it was expressly recognized by the Supreme Court of the United States in Benton *vs.* Boyle (9 Cranch, 191). If a person has a settlement in hostile country, *by the maintenance of a com-*

mercial establishment there, he will be considered a hostile character, and a subject of the enemy's country, in regard to his commercial transactions connected with that establishment." (*Id., ubi sup.*) "National character may be acquired in consideration of *the traffic* in which a party is concerned. If a person connects himself with a house of trade in an enemy's country in time of war, he cannot protect himself by having his domicile in a neutral country. *He is considered as impressed with a hostile character, in reference to so much of his commerce as may be connected with that establishment.* The rule is the same whether he maintains that establishment as a partner or as a sole trader. * * *

"But though a belligerent has a right to consider as enemies all persons who reside in a hostile country, *or maintain commercial establishments there*, whether they be by birth neutrals or allies or fellow-subjects, yet the rule is accompanied with this equitable qualification, that *they are enemies sub modo* only, or *with reference to so much of their property as is connected with that residence or establishment.* This nice and subtle distinction allows a merchant to act in two characters, so as to protect his property connected with his house in a neutral country, *and to subject to seizure and forfeiture his effects belonging to the establishment in the belligerent country.*" (*Ib.*, *80; Halleck's Int. Law., 715, ch. 29, § 25, and 720, § 34; Levi's Int. Com. Law, Introduc., xliv; Upton's Mar. War., ch. iii, pp. 44 *et seq.;* pp. 64, 69, &c.)

"Besides those persons who are alien enemies strictly so called, as actually bearing arms against one of the belligerent nations, or being liable to be called upon to bear arms against her by the obligation of their allegiance, we have to consider a hostile relation of a much

more complicated nature, the relation that exists between a belligerent nation and that class of persons who, though they be not during a whole war, nor even at a particular period of it, enemies in the strict sense of the word, absolutely and in all respects, yet must be deemed alien enemies to certain intents and purposes of a commercial nature, so that their property may, for the most part, be taken as prize, according to the laws of war between adverse belligerents. Therefore, when we speak of an hostile character, it is to be understood to imply, not hostility to all intents and purposes, but only that degree of hostility which attaches to particular property, and which has been held to authorize the seizure of it." (1 Chitty's Com. Law, ch. 8, p. 395, and following pages, and numerous citations; pp. 404, 406, 408, &c.)

"He who does not owe a permanent allegiance to the enemy, is an enemy only during the existence and continuance of certain circumstances." (Thompson's Laws of War, 21, ch. i, § 2.) "* * * Again, a national character may be acquired by trade; or, as it is called, by commercial domicile. In general, the national character of a person, as neutral or enemy, is determined by that of his domicile; *but the property of a person may acquire a hostile character* independently of his personal national character derived from personal domicile. * * * But *if a person enters into a house of trade in the enemy's country, in time of war*, or continues that connection during the war, *he cannot protect himself by mere residence in a neutral country.* * * * All trade that does not originate from the belligerent country is protected; *but not so if it can be traced so to arise in not too remote a degree.*" (*Id.*, 27, 28.)

To the like effect are the decisions: "A merchant may,

at the same time, possess the commercial character of several nations." (The Ann Green, 1 Gall., 286, citing The Vrendscap, 4 C. Rob., 166, and the Jonge Klassina, 5 C. Rob., 297; The Phœnix, 5 C. Rob., 20.)

"The property of a person may acquire a hostile character altogether independent of his own peculiar character derived from residence. In other words, the *origin* of the property, or the *traffic* in which it is engaged, may stamp it with a hostile taint, although the owner may happen to be a neutral, domiciled in a neutral country. * * * So the produce of an estate belonging to a neutral in an enemy's colony is impressed with the character of the soil, notwithstanding a neutral residence. * * * The principle to be extracted from these cases seems to be that where a person is engaged in the ordinary or extraordinary commerce of an enemy's country, upon the same footing and with the same advantages as native resident subjects, his property *so employed* [*Mem.*—These words italicized in the opinion] is to be deemed incorporated into the general commerce of that country, and subject to confiscation, be his residence where it may. The principle seems founded in reason. Such a trade, so carried on, has a direct and immediate effect in aiding the resources and revenues of the enemy, and in warding off the pressure of the war. It is not distinguishable from the ordinary trade of his native subjects. It subserves his manufactures and industry; and its whole profits accumulate and circulate in his dominions, and become regular objects of taxation in the same manner as if the trade were pursued by native subjects. There is no reason, therefore, why he, who thus enjoys the protection and benefits of the enemy's country, should not, *in reference to such trade* [italicized

in the original] share its dangers and its losses. It would be too much to hold him entitled, by a mere neutral residence, to carry on a substantially hostile commerce, and, at the same time, possess all the advantages of a neutral character." (The San José Indiano, 2 Gall., 285–'7; Wm. Bagaley, 5 Wall., 405, second paragraph from bottom, and citations.)

"By investing his means, and participating in the trade and mercantile concerns of a belligerent, a neutral has, in effect, affixed to him the national character of the places at which he carries on his commerce." (Citing Halleck's Int. Law, c. 29, §§ 26, 27; Upton's Mar. War, 124; The Dee Gebrœders, 4 C. Rob., 232.) "The produce of the enemy's soil and country, owned by a neutral, *while it remains in the enemy's country, particularly if obtained therein by a resident agent* of the neutral merchant, has imparted to it the stamp of enemy property, and the owner is, *pro hac vice*, an enemy." (The Mary Clinton, Blatchf'd Pr. Cas., 560; The San José Indiano, 2 Gall., 268, 290; 1 Duer on Ins., 527.)

In the case of the Vrow Anna Catharina (4 C. Rob., 119), it is said: "In such a state what is there wanting to constitute the absolute Spanish character? Nothing but bodily domicile. The parties can hardly be said even to want that, *because they have a stationed, resident agent* in the Spanish settlement, for the very purpose of conducting this permanent commercial undertaking. It is not indeed held, *in general cases*, that a neutral merchant, *trading in the ordinary manner*, to [not *in*] the country of a belligerent, does contract the character of a person domiciled there, by the *mere* residence of a stationed agent; because, *in general cases*, the effect of such a residence is counteracted by *the nature of the trade* and

the neutral character of the merchant himself." (4 C. Rob., 119; the Rendsborg, 4 C. Rob., 121.) In this case, p. 124, it is said to be "a possible thing that the commerce may not be neutral, although the property is, and if that is the case, the mere neutral ownership will not be a sufficient title to restitution." But if the property itself be hostile, then he who buys it in an enemy's country, *flagrante bello*, acquires with it, and with relation to it, a character of hostility.

"It is a settled principle that *traffic alone*, independent of residence, will, sometimes, confer a hostile character on the individual." (3 Philm. Int. Law, 728 (2d Eng. ed.), sec. ccccIxxxiv, citing the Susa, 2 C. Rob., 255.) So the property which is the subject of traffic may be hostile. (Miller *vs.* U. S., 11 Wallace, 305.)

If the effect of such dealings is to impress upon a resident in a neutral country a belligerent character with relation to such property so purchased, he is clearly brought within the category of those who have furnished aid and comfort to the enemy, with whom he is considered as enrolled. He has so effectually aided and comforted them as to be deemed of them.

"By intendment of law, all property condemned is the property of enemies; that is, of persons *so to be considered in the particular transaction.*" (The Elsebe, 5 C. Rob., 176.) That is what concerns us here. We are *not seeking to punish the claimant personally*, nor to inquire into his general sentiments toward us during our late civil war, but we are establishing the *status* he then assumed *with reference to this particular property;* and we can inquire into his other conduct so far as it tends to fix the true character of this relation between the claimant and the captured property.

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"By investing his means, and participating in the trade and mercantile concerns of a belligerent, a neutral has, in effect, affixed to him the national character of the places at which he carries on his commerce." (Citing Halleck's Int. Law, c. 29, §§ 26, 27; Upton's Mar. War, 124; The Dee Gebrœders, 4 C. Rob., 232.) "The produce of the enemy's soil and country, owned by a neutral, *while it remains in the enemy's country, particularly if obtained therein by a resident agent* of the neutral merchant, has imparted to it the stamp of enemy property, and the owner is, *pro hac vice*, an enemy." (The Mary Clinton, Blatchf'd Pr. Cas., 560; The San José Indiano, 2 Gall., 268, 290; 1 Duer on Ins., 527.)

In the case of the Vrow Anna Catharina (4 C. Rob., 119), it is said: "In such a state what is there wanting to constitute the absolute Spanish character? Nothing but bodily domicile. The parties can hardly be said even to want that, *because they have a stationed, resident agent* in the Spanish settlement, for the very purpose of conducting this permanent commercial undertaking. It is not indeed held, *in general cases*, that a neutral merchant, *trading in the ordinary manner*, to [not *in*] the country of a belligerent, does contract the character of a person domiciled there, by the *mere* residence of a stationed agent; because, *in general cases*, the effect of such a residence is counteracted by *the nature of the trade* and

the neutral character of the merchant himself." (4 C. Rob., 119; the Rendsborg, 4 C. Rob., 121.) In this case, p. 124, it is said to be "a possible thing that the commerce may not be neutral, although the property is, and if that is the case, the mere neutral ownership will not be a sufficient title to restitution." But if the property itself be hostile, then he who buys it in an enemy's country, *flagrante bello*, acquires with it, and with relation to it, a character of hostility.

"It is a settled principle that *traffic alone*, independent of residence, will, sometimes, confer a hostile character on the individual." (3 Philm. Int. Law, 728 (2d Eng. ed.), sec. ccccclxxxiv, citing the Susa, 2 C. Rob., 255.) So the property which is the subject of traffic may be hostile. (Miller *vs.* U. S., 11 Wallace, 305.)

If the effect of such dealings is to impress upon a resident in a neutral country a belligerent character with relation to such property so purchased, he is clearly brought within the category of those who have furnished aid and comfort to the enemy, with whom he is considered as enrolled. He has so effectually aided and comforted them as to be deemed of them.

"By intendment of law, all property condemned is the property of enemies; that is, of persons *so to be considered in the particular transaction.*" (The Elsebe, 5 C. Rob., 176.) That is what concerns us here. We are *not seeking to punish the claimant personally*, nor to inquire into his general sentiments toward us during our late civil war, but we are establishing the *status* he then assumed *with reference to this particular property;* and we can inquire into his other conduct so far as it tends to fix the true character of this relation between the claimant and the captured property.

It is partially with this view (though it also has other bearings) that we refer to the manner of introducing into the blockaded southern ports those articles with which Collie & Co. paid for this cotton.

III. These citations and decisions refer to cargoes taken as prize at sea. But if the produce of a hostile soil, though owned by a neutral, is there liable to capture and condemnation, after it has left the country of its production and is found upon the common highway of nations, the reasons which lead to this conclusion and subject it to condemnation, apply with far greater force to such merchandise when seized within the limits of the enemy's territory. Especially is this the case after Congress, exercising both the belligerent right and that conferred by the Constitution, "to regulate captures," has expressly made it liable to capture. (Brown *vs.* U. S., 8 Cranch, 129.) In the before-cited case of Thirty Hogsheads of Sugar *vs.* Boyle, 9 Cranch, 199, this court said: "Personal property may follow the person anywhere, and its character, *if found on the ocean, may* depend on the domicile of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly, according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a violent offense to the course of human opinion, to say that the proprietor, so far as respects his interest in this land [cotton] partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities. In condemning the sugars of Mr. Bentzon as enemy property, this court is of opinion that there is no error, and the sentence is affirmed, with costs."

It is true, there has been a distinction made between an enemy's movables on sea and on land; the former being subject to capture, upon the outbreak of hostilities, without legislation, express executive authority, or special circumstances; while as to the latter some one of these incidents is necessary to justify its seizure; but as to such property as has so been made liable, the principles which govern the exercise of the right, and the position which the law assigns to its owner, must be the same as those relating to prize. To this extent the doctrines of prize causes are applicable.

Starting with the same assumptions with which the claimant commences his argument—viz, that the contest was a civil war, in which both parties had belligerent rights—the supreme court of Tennessee lay down eight propositions which state more succinctly than we have been able to find them elsewhere, the true doctrine in relation to the capture of property on land, except that no mention is made of the effect of express legislation. The third, fourth, and seventh propositions are these:

"3. Upon the breaking out of the war all the citizens within the limits of the territory occupied by the respective contestants became enemies of each other respectively, *and all the property within their respective boundaries became enemy's property as to each other.* (Vattel, 321–364.)

"4. The property of the opposing parties, whether on land or water, was subject to capture and confiscation." (Vattel, 364.)

"7. Private property in which the hostile power had any interest, which property might be available for purposes of war, was *prima facie* a subject of capture."

(Cummings *vs.* Diggs, 1 Heiskell, 72–73. See also Branner *vs.* Felkner, *Id.*, 231, 232.)

Judge Story says: "In respect to the goods of an enemy found within the dominions of a belligerent power, the right of confiscation is most amply admitted by Grotius, and Puffendorf, and Bynkershoek, and Burlemaqui, and Rutherforth, and Vattel. Such also is the rule of the common law." (The cargo of the Emulous, 2 Gall., 580; Dana's Wheaton, § 346, and citations *ante.*) The only difference, as before remarked, between Judge Story and his associates was as to the necessity for and existence of legislation authorizing the land capture of hostile property found within our own limits when war was declared. The majority of this court held that the practice of general seizure of the private property of our enemy's citizens found here when war began has so fallen into desuetude as to require legislation to authorize it. The right, where it does exist, is precisely the same on sea as on land. When the captured and abandoned property acts directed the seizure of cotton it became equally liable ashore or afloat; or, at least, as much liable in the former as in the latter case. (Woolsey's Int. Law, §§ 118, 119, *et seq.*)

The right to seize upon the ocean is because our rights upon that element are equal to those of every other nation, and it so becomes *a part of the theatre of war.* (De Burgh's Mar. Int. Law, 1, 2.)

But our enemy's territory, especially when invaded, besieged, and blockaded by us, is much more so. Twiss places the exercise of belligerent rights on land and sea upon the same footing. "The rights of a belligerent nation, as such, which are founded upon a state of war existing between it and another nation, can only be ex-

ercised by it within its own territory, where its rights of empire (*imperium*) are always supreme, or *within the territory of its enemy*, whose empire it is entitled by its declaration of war to supersede by force, or on the high seas, or on land which is not under the empire of any nation." (2 Twiss' Law of Nat., 440.) "The right of belligerents to seize the property of the enemy leads to the right of search; *their right to prevent neutrals from interposing in the war* produces the right of blockade and of capturing contraband." (2 Wildman's Inst. of Int. Law, 1.)

"The corporeal and incorporeal property of the enemy is liable to confiscation; and an enemy may be attacked wherever he is found, by sea or land, except in a neutral territory, where he is inviolable, not from any *personal* privilege which he acquires thereby, but in respect of the rights of the sovereign of the country." (*Id.*, 9.) This is true of enemy property, liable to capture. In a note to his edition of Wheaton's International Law, Mr. Dana says that the difference between enemy's property on land and on sea is one of practice, regulated by ideas of expediency, and not of principle, concluding that "The matter may then be summed up thus: merchandise, whether embarked upon the sea or *found on land* in which the hostile power has some interest for purposes of war, is *prima facie* subject of capture." (Dana's Wheat., § 355, note 171.)

Speaking of property upon land, General Halleck says that the declaration of war "gives to one belligerent the right to deprive the other of everything which might add to his strength and enable him to carry on hostilities"; that though, by the extreme right of war, all property of an enemy is deemed hostile and subject to seizure,

yet that a distinction as to appropriation and condemnation is made between different kinds of property, and this, under the general law of nations, irrespective of Constitutional provision or Congressional enactment. (Halleck's Laws of War, 446, ch. xix, § 1.) Upon p. 714, ch. xxix, § 25, the same author says, of a neutral merchant going into the territory of a belligerent to collect *ante-bellum* debts, "If, instead of confining himself to the legitimate object of his visit, he engages in a trade purely national, his character, *with respect to such trade*, is regarded as hostile, *and the property embarked in it, if captured, is condemned.*" (*Ib.*, 714 and 721, § 35.)

"The right of seizing the property of the enemy is a right which extends, generally speaking, universally, *wherever that property is found.* The protection of NEUTRAL territory is an exception to the general rule only." (The Vrow Anna Catharina, 5 C. Rob., 17, top.)

"Another important consequence of war on the belligerents themselves is to subject the *trader's* property *on land* or at sea to the danger of capture," &c. "And though this right is *not often exercised* as regards property on land, at sea the right of capture is generally upheld." (Levi's Int. Com. Law, Introduc., p. xliv.) By "upheld," he evidently means "exercised."

If the soil is deemed hostile on account of its capability of producing the means of carrying on the war, and the alien non-resident proprietor is considered an enemy, so far as his landed proprietorship extends, in consequence of such capability, *a fortiori* should the matured product itself be deemed hostile, especially when of a nature so peculiarly adapted as cotton was to support hostilities; and when, further, it is for that

reason impressed by legislation with a hostile character, or such character is recognized by the legislature as already existing. If the property itself is, for these reasons, found to be of a hostile nature, its alien non-resident owner dealing in it, within the enemy's lines, after the war has become flagrant, is to be considered as an enemy *wherever that question arises with relation to his connection with that property* so acquired, especially if it has been seized, as a capture *jure belli*, in the enemy's country.

No other species of property ever before bore such a direct and controlling influence upon a war, not merely in its progress and as a means of support, but in its origin—as being the very *casus belli*—as cotton bore to our rebellion. Its sway over the fortunes of the seceding States was recognized by their avowal that "cotton is king," and that it would compel the manufacturing countries of Europe to bow to its behests.

This product of this soil had been so largely the source of supply to the spindles of the world, that it practically amounted to a monopoly as stringent as ever was created by governmental edict. The rulers of the Confederacy had officially declared its importance as a source of revenue and support of belligerent operations by making it the basis of their loan.

The pecuniary advantages arising from its sale were the same, the price having been paid, whether it were at once shipped or stored to await future developments. The sale to Collie was different from a purchase and sale between citizens of a Southern State, in that it brought new resources from abroad to the aid of the rebellion.

We press these considerations, because the nature of the property is always and fairly an element in determining how those dealing in it are to be treated.

The claimant's counsel discuss only the rights of *neutral* property and the laws pertaining thereto. That does not concern us here. As stated by the Tennessee court, *ubi supra*, and by the authorities *passim*, *all* property in the rebellious States was hostile as to us. Congress had and exercised the right to say that certain articles of it should be captured because of *its* hostility, not because of that of its owner. After the enactment of such statutes, *all* cotton became not merely hostile, but liable to capture on that account. From that date the soil of the Confederacy could produce none other. Neutral or loyal cotton could no more be gathered from it than figs of thorns or grapes of thistles. When Savannah was captured, there was not in the whole State of Georgia so much as one solitary bale of *neutral* cotton, no matter what was the nationality, domicile, character, or sentiments of its owner. Its *situs* and nature controlled every other consideration, and impregnated it with the hostility that filled the air. This element of hostility germinated in its seed and grew into its fiber. Nor was this belligerent character confined to cotton or the products of this soil alone. It attached to every article run into the Confederacy through and in violation of our blockade.

We say, then, that the claimant's counsel put the case upon the wrong ground when they continually speak as if the government claimed a *forfeiture* of this property as a *punishment* for the acts of Collie. Not at all. (Miller's case, 11 Wall., 305, near bottom; Bynkershoek's Laws of War, 25; Halleck's Int. Law, 457–460, and citations *supra*.) It asserts the belligerent right to capture, irrespective of ownership; and that it can lawfully do as it pleases with property rightfully captured.

With great respect for counsel and appreciation of the eminent ability displayed in the conduct of the prosecution of this claim, it does seem to us that the position assumed, that our right to capture the guns sent by Collie to the Confederacy terminated when they were brought within a marine league of the shore was preposterous. Whether or not it will be reiterated here we do not know. Near the bottom of page 56 of the brief below it was thus stated: "As to his transaction with the Whitworth guns, that was a part of his general commercial transactions with the belligerent, and *the only right conferred by the public law upon the government* of the United States was the right to capture the guns *jure belli* as contraband of war, or enemy's property, *if found on the high seas.*" That is, after arriving at Wilmington, and before delivery to the Confederate authorities, before Collie had completed the donation, the guns could not be lawfully seized by us, if that town and its contents had fallen into our hands. What can we think of the soundness of an argument the logical sequence of which was a conclusion so obviously absurd?

It is justified as little by authority as by reason. No writer, ancient or modern, has ever imagined, so far as we can find their expressions, that contraband articles and blockade-runners could not be pursued into a *hostile* port or country, though the vessel and cargo are purged of offense if they succeed in reaching their *neutral* destination upon the return voyage. Indeed, in the "pregnant words" quoted by counsel from Chancellor Kent, in which "the whole doctrine of the law of nations is summed up," he says: "The right of the neutral to transport, and of the hostile power to *seize*, are conflicting rights, and neither party [nation] can charge the

other with a criminal act." So the quotation from Parsons, J., that goods shipped "may be rightfully seized and condemned." (Richardson *vs.* Maine Ins. Co., 6 Mass., 113; Santissima Trinidad, 7 Wheaton, 340.)

A difference has always been made as to property owned by an alien, or even by an enemy, between that so held at the outbreak of hostilities and that subsequently acquired. "Personal property, *except such as is the produce of the hostile soil*, follows, as a general rule, the rights of the proprietor; *but if it is suffered to remain in the hostile country after the war breaks out, it becomes impressed with the national character of the belligerent where it is situated.*" (The Wm. Bagaley, 5 Wall., 408, ¶ 4; The Ann Green, 1 Gall., 287; United States *vs.* Grossmayer, 9 Wall., 72.)

IV. But if the cotton of a loyal citizen was exposed to capture, *a fortiori* must his be who has acquired it *flagrante bello*, by a violation of our blockade, and in return for military supplies so furnished to our enemy.

It is asserted that in all he did Collie violated no "public law."

While we consider this not pertinent to the issue, we are not sure that it may not be deemed material by the court, or some member of it, as it seems to be greatly relied upon by the able counsel for the claimant; therefore, we propose to show that this position is untenable.

The law of nations considers it an offense to break a blockade—rightfully punished by that nation whose blockade is broken.

"Among the rights of belligerents there is none more clear and incontrovertible, or *more just and necessary in*

its application, than that which gives rise to the law of blockade." (1 Kent's Com., *143; 3 Phillimore, Int. Law, 473, § cclxxxv.) Blockade "is founded on the principles of *natural reason*, as well as on the usage of nations." (Bynk., Q. J. Pub., Bk. I, c. 4, § 11; Chitty, Law of Nations.) "*The trade is illegal the moment the limits of the neutral jurisdiction are passed.*" * * *

"The fact that neutral governments are not, according to present usages and customs of international law, bound to restrain their subjects from engaging in the trade, and that the courts of justice in the neutral country have no power to enforce any penalties on persons embarking in it, *does not make the trade legal* in the proper sense of the term." (Kerr's Essay on "The Principles and Rules of Neutrality," 2 Jurid. Soc. Papers, 635; 1 Duer on Ins., 750 *et seq.*, lect. viii, §§ 23, 24.)

"The commerce *ceases to be legal* when the *subject matter* consists of any article termed contraband of war. The moment a neutral brings to either belligerent such articles as he knows are bought specifically for carrying on the war, he becomes auxiliary to the hostile measures of the enemy and forfeits his right of protection." (Levi's Int. Law, Introduc., xlv and xlvi.)

In his Treatise on the Laws of War (Du Ponceau's ed.), p. 31, Bynkershoek says that "*by the law of nations* and *according to the principles of reason* it is *not lawful* to carry anything to a blockaded port, nor to take anything away from it."

The law of nations limits the punishment which can be inflicted upon the offender whose ship and cargo are seized upon the high seas, the common domain of all, and where the ship is deemed part of the territory of the nation to which she belongs, to their confiscation;

and the right to inflict that punishment is limited to a seizure before completion of the return voyage. But that does not apply to property captured from the enemy within his or our own territorial limits, nor are the principles applicable to these latter cases identical with those which govern the law of nations as to prizes made upon the ocean, outside of our peculiar and exclusive jurisdiction. Nor is the offender less an offender because he has escaped arrest upon the sea. If the vessel complete her return voyage, she cannot be seized thereafter for this offense *upon the ocean*, nor can she be seized in her own or a friendly port; for *there* she is amenable to local and not public law; but this public law does *not* prevent a nation from saying what shall be done with *all* property captured or found within its jurisdiction, whether of a citizen or an alien, of an offender or of an innocent person.

If illegal, by public law, to run the blockade and to furnish military supplies, &c., *a fortiori*, was it so to render voluntary aid to a belligerent; to cover his vessels with false flags and spurious papers; to become a partner with him in hostile enterprises. (The Wm. Bagaley, 5 Wall., 406–8.)

But it would be unreasonable to say these acts were wrong and illegal as to us, and yet that we could not deprive the actor of the fruit of these unlawful enterprises even though their results were invested in an article liable to capture alike whether belonging to a rebellious or loyal citizen, and found in a besieged and invested city.

It is equally unreasonable to say that the cotton could have been seized if shipped, but not while stored awaiting shipment. "When property has borne such [hostile]

character at the commencement of the voyage, the general rule seems to be that it cannot change that character on its passage; or, as it is generally expressed, *in transitu*." (1 Chitty's Com. Law, 411.) It cannot be that the mere putting on shipboard makes any difference. The hostile character exists and is established before the shipment is made. The cotton, if liable four miles out at sea from Savannah, was liable there, when that city surrendered.

V. The United States, during the late war, was sovereign, as well as belligerent, and acted in both capacities. (Prize Cases, 2 Black, 673; Miller *vs.* United States, 11 Wall., 306, and cases there cited; Lamar *vs.* Brown, 92 U. S., 195; Rose *vs.* Hinely, 4 Cranch, 272.)

They had authority to declare and define by legislation the *status* of property throughout the extent of our territorial jurisdiction, and to enforce such laws wherever our arms subjected insurgent states and localities to their rightful sway.

Whoever comes into this country in the time of peace subjects himself *pro tempore* to our municipal jurisdiction. (Sch. Exchange *vs.* McFaddon, 7 Cranch, 144.) Whoever in time of war sends through our blockade any merchandise which is exchanged, directly or indirectly, for cotton, and that cotton is stored in such port within our territorial jurisdiction, though held temporarily by our domestic enemies, takes the hazards and chances of war as to that property, and of losing it by its being captured by our forces. At sea, it is exposed to the risks of being seized by our Navy; on land by either Army or Navy (if in a seaport), its capture being authorized by legislation, which is *entitled* to obedience,

over the places where the purchase or exchange of the cotton occurred, and which is enforced and made practically efficient *pari passu* with the advance of our Army and the extension of our lines. (United States *vs.* Diekelman, 92 U. S., 525, 526.)

"My obligations flow from commands given to me. The authority to command me is in the sovereign of the place where I am. It is evident that we have here the germ of the principle of *lex loci*. But, to become more than a germ it needs some further explanations. The local sovereign can command the actions of those persons only who, at the time of the command, are within his dominions, and he can command to them those actions only which are there to be performed. For his power is limited by that of all other sovereigns, of which—since to forbid is itself to command—one element is that *every sovereign can prohibit all men everywhere from doing anything within his dominions.* It is from this last proposition, the universal extent of negative commands, that the rule of *lex situs* follows in questions of property. For the commands which create property are negative and universal. They consist in the prohibition of all such acts as would interfere with the proprietor's enjoyment of those privileges which the law attributes to him; and this prohibition is extended to all mankind, without distinction of their nationality or temporary situation, because the act of interference, if committed at all, must from its nature take place where the thing which is the subject of property is. It must, therefore, rest with the territorial sovereign to declare both the modes of property and how title shall be made to it. The modes of property; that is, what privileges the owner shall enjoy, and how long he will enjoy them,

for this depends on the interferences *he* chooses to prohibit, and the term during which he will prohibit them. The title to property; that is, when, to whom, and how the privileges shall be transferred, for the real question is the transfer of the prohibitions. Nor is there anything in theory which can, for these purposes, distinguish movables from immovables." (Westlake's essay on the relation between public and private international law; 1 Jurid. Soc. Papers, 184; The Santissima, &c., 7 Wheat.) In short, property is a creature of law, which regulates its acquisition and tenure. (See Savigny's Private Int. Law, c. I, sect. XXIII, § 366 (Guthrie's ed.) and the editor's note.)

These are regulated by the law of the time and place. We must inquire, then, into the circumstances of time and place which affected the title Mr. Collie acquired. The Confederacy had been recognized by England as a belligerent. It never was conceded by that or the other Great Powers to be a sovereign. It was struggling for such recognition; striving for a crown it never was permitted to wear. Therefore, those who went there, like Mr. Collie, knew they were going into a country which was in a state of belligerency, battling against the only recognized sovereign of the territory—the United States.

"There is a well-defined distinction between belligerents merely, and belligerent States. The former can exercise the rights of war only, while the latter can exercise both sovereign and belligerent rights. The fact that the rebels, pending the war, were recognized as belligerents, by no means concedes to them the rights of sovereignty either absolute or de facto; and, after the war terminated, they may be arraigned and tried under the muni-

cipal authority for treason, or pardoned and forgiven by the sovereign power." (Hammond *vs.* State, 3 Coldwell, 138.)

Although Judge Rives may have deduced an erroneous conclusion from the premises, we think the principles laid down by him in the opinion from which we make the following extended extract are correctly stated:

"Under our complex system of State and Federal Governments, the Constitution of the United States is not overthrown by the insurrection of any portion of the people, however formidably arrayed or efficiently organized under all the facilities of revolt arising out of their separate organizations into States, under all the forms and with all the powers necessary to command the resources and services of their inhabitants. Whatever may have been the theory, on which this rebellion was projected and justified, it has confessedly yielded to the grand arbitrament of arms, and we need not now be disquieted or harassed by any doubt that the Constitution of the United States reigned supreme over all the States and all the citizens during the whole of this deplorable conflict and since, with such exceptions only as are due to the clash of arms and the necessities of state. We shall in vain look through the whole range of decisions of the Supreme Court for the slightest intimation that this rebellion had affected the supremacy of the Constitution, or released the revolted States or their citizens from its authority or their allegiance to it. It is true that the war was of such dimensions, and was so organized, under the auspices of the revolted States, into a new and separate Confederacy, that the Government of the United States was compelled to waive some of its strict and theoretical rights over the insurgents.

It would have been idle to send out with its armies, as was done in the case of the whisky insurrection in Pennsylvania, civil officers, to whom captured insurgents might be turned over for arrest, trial, conviction, and punishment. It was the dictate of necessity and policy to recognize the Confederate States as a government *de facto;* to concede belligerent rights to them; to acknowledge a state of internal war; to treat captives, both on land and sea, as prisoners of war, and provide for their exchange; to declare a blockade of the ports in the insurrectionary districts, and assert under the law of nations the rights of capture and prize *jure belli.* These concessions were properly made to mitigate the rigors of this fratricidal war, and conduct more effectively and humanely to the suppression of the revolt. They were conceived in the spirit of the exalted teachings of the most enlightened and accredited publicists.

* * * * * * *

"While, therefore, in the pursuance of these wise and humane maxims, the Government of the United States departed from the theory *strictissimi juris* in its Constitutional suppression of this insurrection, there was never in any authoritative quarter an admission that the insurgents, by reason of being acknowledged as quasi enemies to the extent of these concessions, were not amenable to the Constitution and the laws. This did not, in fact, involve any contrariety in the status thus ascribed to them, and when such was alleged in the Prize Cases (2 Black, U. S. R., 635, 670), Justice Grier, with no little warmth, denounced it as 'anomalous'." (Billgery *vs.* Branch, 19 Grattan, 401–403.)

"The sovereign may forbid the entrance of his terri-

tory, either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, accordingly as he may think it advantageous to the state." (Vattel, book ii, c. 7, § 94; New York *vs.* Miln, 11 Peters, 102; Passenger Cases, 7 Howard, 283; Henderson *vs.* Mayor, 92 U. S., 259; Chy Lung *vs.* Freeman, *Id.*, 275; Fleming *vs.* Page, 9 Howard, 615, bottom; United States *vs.* Gould, 8 Am. Law Reg. (O. S.), 531.) If, in disregard of such prohibition, a foreigner forces his way into the country to carry on a forbidden traffic, and purchases an article liable to capture, and is encouraged and protected in so doing only by those in armed resistance to the rightful sovereign, he must apprehend that the safety of his investment depends upon the issue of that conflict, and whether the resistance is maintained or overpowered. (Creasy's Int. Law, 508–510, § 481; 512, § 483, citing United States *vs.* Hayward, 2 Gall., 500, and 3 Philm., 737.)

"The capacity of a thing to become subject to private property, and, therefore, not to belong to the *res quarum commercium non est*, is to be judged by the law of the place where the thing is situated." (Savigny's Int. Law, 138, c. i, sect. xxiv.)

The United States were the lawful sovereign over Savannah where this cotton was. Its capacity to be dealt in was regulated by our laws, qualified (if at all) only by the military authority which set them at defiance. A title acquired in violation of our commands and vindicated only by military array must fail when our arms triumph and the property is captured. It cannot be contended that the authority then predominant, civil or military, could give to Collie any better title to property so acquired than that by which his vendors held it. It was

transmitted to him, liable to be defeated by a capture *jure belli*. Our own courts certainly can recognize no title superior to our laws. (Gelston *vs.* Hoyt, 3 Wheaton, 324; Westlake's Private Int. Law, *243, ch. viii, § 260.)

Buying this produce of the soil was analogous and equivalent to buying land. Of this Halleck says, "Whether a neutral can make such purchases and not become *a party to the war*, will depend upon the character of the assistance which, by the purchase, is afforded to the conqueror, to the injury of the opposing belligerent. It is certain that if he should attempt to possess himself during the continuance of the war of the lands so purchased, *or to maintain the title so acquired*, after the restoration or recapture of the property so alienated, he would assume a hostile attitude toward the original sovereign owner, and make himself a party to the war." (Halleck's Int. Law, 450, ch. xix, § 6.)

The only sovereignty over this territory ever recognized by anybody was our own. "A blockade is an act of sovereignty." (2 Wildman's Int. Law, 178, citing the Henrick & Maria, 1 C. Rob., *148.) Then the recognized sovereign, the United States, was blockading its rebellious and belligerent ports, "to prevent neutrals interposing in the war." Collie breaks through to interpose. Against the commands and in defiance of the rightful authority of the only sovereign ever recognized as such by his own country, he forces or steals his way through to acquire property against our policy and laws; and now comes before our courts asking their aid to protect such a title. He could only purchase the property by one or many breaches of our blockade, and could only remove it, before Savannah fell, by several more. It was stored in a besieged city, blockaded by sea and

invested by land, and by all the laws of war followed its fate, for the same reason that neutral goods put on board an armed belligerent vessel share her destiny. In Thomson's Laws of War, 75, Sir Wm. Scott's language is thus quoted: "If the neutral puts his goods on board a ship of force, which will be defended by force, he betrays an intention to resist visitation and search, and so far adheres to the belligerent, and withdraws from his protection of neutrality." (The Fancy, 1 Dodson, 448; The Primus, 29 Eng. Law & Eq., 589.) By storing his cotton in Savannah, Collie indicated a corresponding purpose. The insurgents never held that city as the English did Castine in 1814; or as we did Tampico in 1847. We held it under strict blockade, and were constantly and actively contending for its possession. The rebels *never* had quiet and undisturbed possession. Though the English had such "firm possession," it was only as to our revenue laws that Castine was deemed foreign (United States *vs.* Rice, 4 Wheat., 246); and as to such laws Tampico was also held foreign by our courts though other countries might hold us responsible for its government. (Fleming *vs.* Page, 9 Howard, 603.) A comparison of these decisions shows that goods are to be entered and dutiable where the United States has a collector. The importations into Castine were without our consent, and were restored to our subjection by a peace, upon the basis of acquiescence in what had been done, and not by capture. There was a recognized sovereignty (British) holding Castine; and (ours) that held Tampico. Nobody ever recognized the Confederacy as a sovereignty or government; but only that certain people were fighting (in vain) to establish one. (Gelston *vs.* Hoyt, 3 Wheat., 324, bottom.) The eminent writers upon the

law of nations "speak altogether of the rights which *a sovereign* acquires, and the powers *he* may exercise in a conquered country, and they do not bear upon the question we are considering." (Fleming *vs.* Page, 9 Howard, 617, bottom; Rutledge *vs.* Fogg, 3 Coldwell, 558.)

IV.

Not only did Collie violate the law of nations but he disregarded the proclamation of his own sovereign, promulgated May 13, 1861, found on pages 572 and 573 of the second English edition of the first volume of Phillimore's International Law, whereby she warned all her loving subjects, and all persons whomsoever entitled to her protection, that if any of them shall presume, in contempt of this royal proclamation and of her high displeasure, to do any acts in derogation of their duty as subjects of a neutral sovereign in the said contest, *or in violation or contravention of the law of nations* in that behalf, as, for example, * * * "*by breaking or endeavoring to break any blockade* lawfully and actually established by or on behalf of either of the said contending parties, or by carrying *officers, soldiers, dispatches, arms, military stores or materials, or any articles considered and deemed to be contraband of war*, according to the law or modern usage of nations, for the use or service of either of the contending parties; all persons *so* offending will incur and be liable to the several penalties and penal consequences by the said statute or *by the law of nations* in that behalf imposed or denounced."

In a note (*g*) to p. 466 of that volume Dr. Phillimore declares every sale of the munitions or material of war to be "a clandestine evasion" of the foreign enlistment act.

The vessels owned by Collie with North Carolina and with the Confederacy were the public ships of those belligerents, *i. e.*, belonging to those governments and not

merely to their citizens; so every equipment of them, shipment of crew, &c., &c., in London was a violation of the foreign enlistment act. It also violated the law of nations; for this, as well as the seventh section of the foreign enlistment act, puts transport and store ships and armed cruisers upon precisely the same footing. (The Santissima Trinidad, 7 Wheat., 283; 1 Phillim. Int. Law, App., 569.)

The treaty of December 24, 1814, was the law of England and of the United States. The first article, stipulating for a peace between these countries (8 Stats., 218), bound the citizens of both (Kennett *vs.* Chambers, 14 Howard, 38, 48, *et seq.*). Therefore entering into a partnership, in time of war, with our antagonists was a contract illegal in England. (*Ib.*)

If the acts of Collie were such as to be punishable by his own sovereign, under the laws of his own country, *a fortiori*, has this country, against whom those acts were directed, the right to capture and confiscate the property which he acquired here solely by means of such illegal action? "It does not lie in the mouth of wrongdoers to set up a title derived from a violation of our neutrality" (San. Trinidad, 7 Wheat., 349, top); certainly not, then, of our sovereignty and belligerency.

Public law deals mainly with the relations of nations to each other; and with the actions and affairs of citizens only as they affect, or tend to affect, these relations. Had England passed no neutrality laws, or issued no proclamation, or failed to enforce such legislation, we might properly make claim against her as a nation. Indeed, such failure was the exact basis of the Alabama

claims. But it by no means follows that, had she fully performed her duty, so as not to be nationally responsible, we could not punish, by seizure of property here, any acts of her citizens which were to our injury, and were at the same time "a clandestine evasion" of her neutrality laws.

V.

As Collie's acts violated neutrality, they were against the public policy of nations, of his own country, and of this, in which he seeks to enforce his claim. (1 Story on Con., §§ 674, 675, *et seq.;* Totten *vs.* United States, 92 U. S., 105; Kennett *vs.* Chambers, 14 Howard, 38, 50–52; San. Trinidad, 7 Wheaton, 349.)

Judge Story said: "I think that great indulgence is usually granted to neutrals and to citizens, as to transactions in time of peace and *at the commencement* of a war; and, *if they contravene no municipal or national policy*, I am not prepared to say that this indulgence is inconsistent with law." (The Ann Green, 1 Gall., 287.) The obvious implication is that transactions of neutrals which do contravene municipal or national policy are inconsistent with law.

Collie is not claiming the cotton itself by virtue of a legal title. He is trying to show himself equitably entitled to an account and to the net proceeds as a *cestui que trust.* Then he must come into a court for this purpose with clean hands.

Not only is Collie barred of maintaining suit here because his acquisitions were the result of a violated neutrality and of acts *intended* to defeat our public policy, but (for these reasons) he *failed originally to acquire any valid title* to the cotton in controversy. (Whitfield's case, 92 U. S., 170; Sprott's case, 20 Wall., 459; Querouze's case, 7 C. Cls. R., 402; Desmare *vs.* United States, 93 U. S., 612.)

As Collie could have acquired no title had he exchanged munitions, &c., *directly* with the Confederate Government for it, he could acquire none by taking Confederate and North Carolina bonds and money and exchanging them for this cotton. (Cases cited *sup.*)

The point is that these dealings *here* by which he acquired the cotton were unlawful dealings with our enemy. The precise form of the transaction is immaterial, since this is its substance.

It is widely different from the claim of any owner who raised cotton or bought it (even with Confederate money) where it is the representative of labor and capital not devoted to the belligerent purposes of our enemy, but the money is simply employed as an ordinary medium for exchanging one person's labor in *peaceful* vocations for another's. In such case the *title* has no taint of illegality. Collie can show no original title not so tainted. (Grossmeyer's case, 9 Wall., 72.) It is throughout "tainted with the vice of the rebellion." (Whitfield *vs.* United States, 92 U. S., 171.)

Collie has no claim to stand in any better position, in this respect, than our own citizens. (93 U. S., 612.)

VI.

We believe Mr. Collie has no claim upon the principles of international or public law; but are very certain that in the Court of Claims he could recover only by showing such a case, under the statutes, as gives that court authority to award judgment. No such has he made, nor can he make, according to the facts found.

Proof that Mr. Collie did *not* render aid and comfort to the enemy is a condition-precedent to his recovery. (R. S., sec. 1074.)

Congress had a perfect right to impose this condition. (Ogden *vs.* Saunders, 12 Wheat., 349.) It has been repeatedly decided that the legislature has absolute control over rules of evidence; so far, at least, as to change the burden of proof. It is frequently done in liquor statutes and in those relating to the admission of respondents to testify. In New York, the act of 1864, c. 402, § 1, page 911, makes the affidavit of commissioners that a majority of tax-payers had assented to a subscription of stock *conclusive* proof to uphold a subscription; and this was held to be constitutional. (People *vs.* Mitchell, 45 Barb., 208.) See also Hand *vs.* Ballou, 12 N. Y. (2 Kernan), 541; Hickox *vs.* Tallman, 38 Barb., 608; Howard *vs.* Moot, 64 N. Y., 262; Com. *vs.* Williams, 6 Gray, 1; Delaplaine *vs.* Cook, 7 Wisc., 54; Cooley Const. Lims. (3d ed.), 367 *et seq.*, and numerous cases there cited; Webb *vs.* Den, 17 How., 578; Abbott *vs.* Lindenbower, 42 Mo., 162, and 46 Mo., 291, and Allen *vs.* Armstrong, 16 Iowa, 508, that the legislature may declare what shall be *prima facie*, but not what shall be *conclusive* proof; Fales *vs.* Wadsworth, 23 Maine, 555; Rich *vs.* Flanders, 39 N. H., 323; Lumsden *vs.* Cross, 10 Wisc., 289; and Curtis *vs.* Whitney, 13 Wall., 68.

As held by the English prize court in the Vrow Anna Catharina (5 C. Rob., *163), "to entitle them to receive restitution, it must appear that they are proprietors, and, secondly, that they are *qualified* proprietors; that is, that they are persons who are not disabled by any circumstances belonging to this transaction from receiving restitution of their property in this court."

As to Collie, whom amnesty or pardon cannot reach (as we propose to show below), the ruling of the Court of Claims that the act of June 25, 1868, c. 71, § 3, re-enacted in R. S., sec. 1074 (the constitutionality of which is not impugned, as being merely a statutory recognition of the common maxim, that the burden of proof lies on the affirmant), makes proof of claimant's offering no aid to those engaged in rebellion a condition-precedent to recovery, is still correct. (Head-note to Carroll *vs.* United States, 13 Wall., 151; Bond's case, 2 Ct. of Cl., 529; Armstrong's case, 5 Ct. of Cl., 625; Pargoud's case, 4 Ct. of Cl., 337.) The question is one of jurisdiction. (Haycraft's case, 10 C. Cls., 109, and 22 Wall., 92.)

The lords of the privy council, in the case of the Guiana, said this:

"In the first place, it is contended that the owners of the cargo are not bound by the enactment, because they are foreigners. The British Parliament certainly has no general power to legislate for foreigners out of the dominions and beyond the jurisdiction of the British Crown; but it cannot be doubted for a moment that a British statute may fix a time [or any other condition] within which application must be made for redress to the tribunals of the empire. This is matter of procedure, and becomes the law of the forum. On matter of procedure,

all mankind, whether aliens or liege subjects, plaintiffs or defendants, appellants or respondents, are bound by the law of the forum. If a law were made upon this subject working oppression and injustice to the subjects of a foreign state, that state might make representations and remonstrances against this law to our government; but while it remains in force, judges have no choice but to give it effect. Had it been shown to us ever so clearly that in this case the condition required could not have been complied with, if it has clearly, absolutely, and universally been imposed, we should have no power to dispense with it." (Lopez *vs.* Burslem, 4 Moore's Privy Council Cases, 305.)

Exercising its right to regulate captures on land, Congress, in so doing, declared a *rule of property* as to cotton. It was to be seized generally. The cotton itself was thereby lost to its former owner forever. Its proceeds went into the Federal treasury. Certain persons,—those only who were brought within the terms of the statute,—were allowed to make claim to these proceeds by establishing the requisite preliminary facts, viz, their original ownership of the bales which the funds in the Treasury represent, and their personal capacity to receive these proceeds by showing that they did not afford aid and comfort to the enemy. (United States *vs.* Padelford, 9 Wallace, 538.) It was like a statute requiring a testator to be of sound mind and memory. This requirement has been held a condition-precedent, so that the proponents of the will are to prove the maker sane, notwithstanding the usual presumption in favor of sanity. (Robinson *vs* Adams, 62 Maine, 398; Crowninshield *vs.* Crowninshield, 2 Gray, 532; Comstock *vs.*

Hadlyme, 8 Conn., 261.) In the case at bar there is no legal presumption that the claimant did not afford aid and comfort, if (as his counsel declare, and lay stress upon the circumstance) it were no personal crime for him to have done so. It may be likened to a case which requires the plaintiff to make proof of compliance with a negative warranty. (McLoon *vs.* Commercial Ins. Co., 100 Mass., 472.) The statute explicitly demands it. (R. S., § 1074.)

As already argued, the principles to be applied to property captured from the enemy within his or our own territorial limits are not identical with those which control the disposition of prizes made upon the ocean, outside of our peculiar and exclusive jurisdiction.

This court does not sit as a prize court—though possessed of powers, conferred by statute, "somewhat analogous" (92 U. S., 195)—*nullum simile est idem*—to act under and administer the law of nations, but to exercise *statutory* powers; nor can it decline jurisdiction, or be controlled in its judgments by any conflict, real or imaginary, between an act of Congress and the asserted law of nations. If our legislation violates international law or neutral rights, that is a subject for diplomatic claim by the injured nation, and is not to be obviated by judicial construction. (Lopez *vs.* Burslem, 4 Moore P. C., 305, cited *ante.*)

Yet our opponents cite *only* prize cases—as to the effect of acts like those of Collie upon vessels and cargoes engaged in such violations of neutrality when seized upon the high seas; whereas the law which governed this seizure was the *lex rei sitæ.* Upon the ocean, the law of nations relating to prize would have been that

law; but upon land it was (so far as our courts are concerned, at least) that law, with such modifications as Congress might prescribe. (2 Black, 673.) Not only did the claimant's counsel confine their discussion and citations (on this branch of the case) to prize cases, but to those determining the character of the neutral's act as a subject, and *with relation to his own sovereign and nation.*

If the law of nations were the sole *lex rei situs* at the time and place of seizure, then the property became absolutely that of the United States immediately upon its being seized, subject only to the right of postliminy, which hardly need be mentioned, as it does not arise in this case. (1 Kent's Com., *110.)

The statutes were passed not to *authorize* the capture, but to regulate it. (22 Wall., 94.) Becoming absolutely the property of the United States, Congress might properly declare the conditions upon which alone *any person* would be permitted to ask for an account of the net proceeds.

"Whether the soldiery who effect the conquest of the property are to retain it, and, if so, how they are to share it, must be determined by the victorious state's own institutions; and *they form no portion of international law.*" (Creasy's Int. Law, 517, § 488.)

Our opponents treat this question solely as one of crime and its punishment. We deem the statute a rule of property, regulating its tenure; made during and in view of the existence of war, no doubt, but just as much a rule of property as if based upon other considerations: those arising in time of peace, such as the statutes against perpetuities, &c.

Mr. Collie's counsel assert that it is no longer necessary for him to make proof that he did not render aid and comfort to our enemies: that the amnesty proclamation wiped out the statute requiring such proof.

Though Klein's case (13 Wall., 128) does not cover the case of a non-resident alien, and therefore fails to touch the present issue, yet as it is the foundation of the claim that the general amnesty proclamation supersedes the necessity of any proof that aid and comfort were not rendered by the claimant to the enemy, it may be proper to make a slight examination of the real issue in that case and some comment upon the opinion. In the Armstrong Foundery case (6 Wall., 766), the property had been libeled for condemnation because used to aid the rebellion, with the owner's consent. Of course, no title was affected *before* judgment. There was a mistrial, and before any proper judgment was rendered the claimant was pardoned, with restoration of property. Under this state of facts, under every construction of law, there could be no forfeiture; for that accrued from the rendition of the decree and not from the filing of the libel.

In Padelford's case (9 Wall., 531), Padelford took the oath, which entitled him to a restoration of property and rights, *before* his cotton was captured. Therefore the court were not called upon to determine the effect of a seizure before the oath was taken, nor did they do so; and the learned Chief Justice errs when he observes in Klein's case (13 Wall., 138), that "in the case of Padelford we held * * * that actual seizure did not divest the title," &c. This should have been qualified: that such seizure did not devest the title of one previously pardoned upon a condition (including restoration) with which he had complied. Upon the next page of that

report of the case (139) the Chief Justice remarks that the language of the act "makes the right to the remedy dependent upon proof of loyalty, but implies that there may be proof of ownership without proof of loyalty." He thence infers that ownership is recognized as continuing in those not loyal; but this is erroneous, since it is the ownership at time of capture, and not after the proceeds have gone into the Treasury, that must be proved; as he notices in the very next case (Carroll *vs.* United States, 13 Wall., 153). And the act recognizes an ownership which confers no title to the proceeds.

One argument, not presented to the Supreme Court in Klein's case, which we think worthy of statement, is, that while it is true that Congress could not lawfully limit the constitutional pardoning power of the President, neither could he so exercise that prerogative as to infringe the rules constitutionally passed by Congress to regulate captures upon land; and that if these regulations prescribed a certain disposition of them, whether dependent on the *status* of the former owner or not, no pardon could reach or change that disposition. The acts of each department must be so construed as not to impinge upon the constitutional province of the other.

Upon the 17th July, 1862 (12 Stats, 592, c. 195, § 13), Congress had empowered the President to offer pardon and amnesty on such conditions as he might deem expedient to all persons who may have participated in the rebellion. This act was in force till repealed by that of January 21, 1867, c. 8 (14 Stats., 377). Congress could confer power, though it could not deprive the Executive of any vested in him by the Constitution. While this law was in force, to wit, December 8, 1863, the President issued his proclamation (13 Stats., 737), professing

to act under this statute, offering pardon, with restoration of rights, &c., upon certain conditions, with which Klein's intestate fully complied. It was only the title and rights of a person so situated that the court then passed upon.

Mr. Collie cannot comply with the terms of the statutory conditions, because:

I. Running the blockade with supplies of any kind was, *ipso facto*, giving aid and comfort to the enemy. (Sprott's case, 20 Wall., 463, top; The Rapid, 1 Gall., 304; Gearing's cases, 3 Ct. of Cl., 165.)

The act and purpose of breaking our blockade was to carry aid and comfort to our enemies. No matter if Collie's intent was "his own gain," he proposed to go to these cities and get great gain by administering to those wants which our blockade had created, and which it was instituted expressly to create. The stimulus to his action is immaterial. Its inevitable effect must have been perceived by him and cannot be overlooked by us. Hanauer *vs.* Doane, 12 Wall., 346–348; Carlisle *vs.* United States, 16 Wall., 150, 151; Sprott's case, 20 Wall., 463; Whitfield's case, 92 U. S., 170.)

II. He had no right to establish an agency within the Confederate lines to carry on this business after hostilities commenced. (The Ann Green, 1 Gall., 287; Grossmayer's case, 9 Wall., 72.)

III. His trade was a privileged one, in that he was guaranteed a large profit by the Confederate government, and allowed to ship his cotton *free of export duty*, except the slight one specified.

This precludes him from saying he only carried on a neutral trade. It was like the monopoly of tobacco, mentioned in the case of the Anna Catharina, 4 C. Rob., 107. The same learned judge, in a later case, reported in the same volume, said: "These agents are said to reside in the country during the fulfillment of this gigantic contract, to carry on a regular business of export on the part of Mr. DeConinck—rivaling that which the Dutch East India Company could have carried on by its Indian servants. Is this house of trade, *so* settled in Batavia, a circumstance totally insignificant in fixing a Dutch character of domicile on this transaction? I know that a residence of agents in the enemy's country has not been held generally to impress the character of that country upon the transactions of principals resident in the neutral country, *where the transaction itself has been in other respects perfectly neutral.* The neutrality of the trade shall prevail against the effect of that circumstance. *But where the trade itself cannot claim to be so considered, and is carried on from the enemy's country by agents representing their principals therein*, it should seem that the mere personal residence of the principals elsewhere would hardly protect such a trade, so conducted, from being considered the trade of an enemy." (The Rendsborg, 4 C. Rob., 139.)

IV. The State of North Carolina was a belligerent. (12 Stats., 1262; Prize cases, 2 Black, 673.)

Mr. Collie became jointly interested with this belligerent in vessels built and purchased to run the blockade with military and other supplies and in their cargoes. This was in violation of neutrality, as was his connection with the bonds. (The Wm. Bagaley, 5 Wall., 377; Stark's case, 4 C. Cl., 280.)

V. He also joined Mr. Crenshaw and the Confederate Government in similar purchases of vessels and cargoes for like purposes, which as a neutral he had no right to do. (*Ibid.*)

VI. If authorized to sell a ship to the Confederacy, he had no right to put any armament on board, nor to aid in concealing her true character by false papers, &c., as he did. (17 and 18 Vict., c. 104, especially §§ 18, 38, 39, 53, 55, 81, and 103; Maclachlan on Mercht. Shipg. (2d ed.), 24, 66, *et seq.*, and 156; Wharton's Confl. of Laws, §§ 442 and 356.)

All the acts before mentioned were justified by claimant's counsel as those of *trade*, Mr. Evarts declaring that "a neutral cannot *deal* unlawfully." While not inclined to admit the accuracy of this broad proposition, we say that, if true, it would not protect Mr. Collie's claim; because he did acts affording aid and comfort to our enemies which were *not* those of trade.

I. He *gave* a gun to the State of North Carolina, expressly to be used against our blockading squadron off Wilmington, N. C., and to protect vessels in running that blockade.

II. He *gave* a battery of guns to the Confederacy, to be used in the prosecution of the war.

III. He *gave* large sums of money, expressly to relieve the distress which it was the purpose of our blockade to create; and so far he neutralized that blockade. He gave these sums, sometimes to the State of North Carolina and sometimes to the Confederacy.

VI.

Collie's counsel argue that it is immaterial to what extent he aided the rebellion, because all that he did, be the same more or less, was condoned and obliterated by the general amnesty proclamation of December 25, 1868. (15 Stats., 711, 712.)

Unless he can maintain this position, he obviously has no case.

This is a grave question in its general aspects, as well as in its particular application to the cause at bar; but the answer would seem obvious to us, were not the opinion contrary to ours supported by authority of counsel entitled to the greatest respect.

"There has been some difference of opinion among the members of the [Supreme] Court as to cases covered by the pardon of the President, but *there has been none as to the effect and operation of a pardon in cases where it applies.*" (Carlisle's case, 16 Wall., 150.) It was there held that the pardon reached resident aliens. In Green's case (8 C. Cls., 420), that court thought the peculiar point of Carlisle's case had been "thoroughly overlooked," but the principle announced was necessarily acquiesced in, and the only point—as to non-resident foreigners being within the effect of a pardon—left undetermined was there stated. The decision of this court on the first trial of this petitioner's case still left the question open, because it held his acts as then proved not to be illegal or criminal. (Collie's case, 9 Ct. of Cl., 447.) It is now distinctly presented, the testimony since introduced proving acts clearly not warranted by law.

I. The effect of all official acts, whether by the legislative or executive department, must be limited *territorially* within the exterior lines of our own jurisdiction. (Whiting's War Powers under the Constitution, 322.) It was "AS SOVEREIGN"—in contradistinction to the attitude of a belligerent—that pardon was offered, "to recall revolted subjects to allegiance." (Lamar *vs.* Brown, 92 U. S., 195.) But as to Collie, the United States were *not* sovereign, nor did he owe them allegiance; therefore the summons and the offer were not for him. It was an act of "*sovereign* discretion." (*Ib.*) Had it been a war measure, the act of a belligerent, it must have been done before peace was declared; whereas the only proclamations that it can be pretended could affect Collie were issued after the war had ended and his petition had been filed.

II. A pardon is purely *personal.* It restores the innocence of an offender, and affects his property only to this extent, that his guilt cannot be thereafter set up to deprive him of it; but if his person be out of its scope, his property cannot be pardoned for any offense attaching to that or to his mode of traffic in it. Of the confiscation, "it may be remarked that it *has no reference whatever to the personal guilt of the owner* of the confiscated property, and the act of confiscation is not a proceeding against him. *The confiscation is not because of crime,* but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership." (Miller *vs.* United States, 11 Wall., 305.) Hence, if an owner die unpardoned, his representatives cannot claim the cotton after the promulgation of the general amnesty proclamation. (Meldrim's case, 7 C. Cls. R., 595.)

Not merely was Collie's person out of our jurisdiction when he did the acts complained of were done, and when amnesty was proclaimed, but these acts (so far as he manually did them) were done in England. He *there* owned, jointly with our foes, vessels which he fraudulently covered with the British flag, and there floated their bonds, &c.

III. Every statute must be so construed as to effect its obvious purpose, if possible. Indeed, so must every act and expression of a person, private and official, be considered so as to determine his intention, and to accomplish it if legal. Congress, by the act of July 17, 1862, § 13 (12 Stats., 592), did not intend to legislate for persons resident in England, nor did the President have such persons in view when the several proclamations of conditional or absolute pardon were issued. The purpose was to "*recall their revolted subjects* to allegiance by pardon, and restoration to all [their] rights, civil as well as political." (Lamar *vs.* Brown, 92 U. S., 195.)

"The measure, in itself of great beneficence, was practically important only in its application to the loyal Southern people, and sympathy for *their* situation doubtless prompted Congress to pass it," *i. e.*, the captured property act. (Anderson's case, 9 Wall., 65; Klein's case, 13 Wall., 138; the Venice, 2 Wall., 278–9.) The provision was "to save friends." (Haycraft's case, 22 Wall., 94.)

This purpose is manifest in the language of the several proclamations. The last "whereas" in the preamble to that first issued, December 8, 1863, recites that "it is now desired by some persons heretofore engaged in said rebellion to resume their allegiance to the United States,

and to reinaugurate loyal State governments within and for their respective States: Therefore * * * a full pardon is hereby granted," &c, upon condition of taking and keeping the prescribed oath of allegiance. (13 Stats., 737–8.) The proclamation of May 29, 1865 (13 Stats., 758) declares that its predecessors were issued "to induce all persons to return to their loyalty," &c. It then offers conditional pardon to all (except certain persons) who shall take an oath of allegiance therein specified. Of similar tenor and purport was the proclamation of September 7, 1867 (15 Stats., 699, 700). Collie did not and could not comply with the requirements of either of these proclamations. His petition was filed June 7, 1867. If his *status* at the date of that application is to determine his rights (Carroll *vs.* United States, 13 Wall., 153, near top), then he has no standing in court.

But what we wish especially to urge in this connection is, that as Collie and other foreigners were evidently not contemplated by these proclamations, there is no just reason to suppose they were intended to be included in those of July 4 and of December 25, 1868. (15 Stats., 702; *Id.*, 711, 712.) This last, at its conclusion, like its predecessors, offered a "restoration of *political* rights." United States *vs.* Klein, 13 Wall., 142; Lamar *vs.* Brown, 92 U. S., 195.)

Of every pardon there must be an acceptance. (United States *vs* Wilson, 7. Pet., 161.)

The conditions of a conditional pardon must be performed. (Mrs. Armstrong's case, 13 Wall, 155, bottom; Hyams' case, 7 C. Cls. R., 443; Waring's case, *Id.*, 501; Scott's case, 8 C. Cls. R., 447; *Ex parte* Wells,

18 How., 307; Semmes *vs.* United States, 91 U. S., 27, last three lines.) Now, Collie has never complied with the terms of the conditional pardon, which was the only one existing when he filed his petition; therefore the act of filing and prosecuting his petition cannot be deemed an acceptance.

IV. It is "offenses against the United States" that the President has power to pardon. (U. S. Const., Art. II, sec. 11, cl. 1; 11 Att. Gen.'s Ops., 452.)

The acts done must be crimes under the Federal statutes, since our courts have no criminal common-law jurisdiction. (*Ex parte* Bollman, 4 Cr., 75; United States *vs.* Hudson, 7 Cr., 32; United States *vs.* Coolidge, 1 Wheat., 415; United States *vs.* Beavans, 3 Wheat., 336.)

It must be some offense for which he can *then* be *criminally* punished by the Federal courts, for which alone one can be pardoned by the President. If Collie could not have been convicted upon indictment, then the pardon of December 25, 1868, has no relation to him.

Although his conduct may have been unlawful by the law of nations, which this court declares part of our laws, yet unless he could be personally punished under our legislation, there is nothing for a pardon to reach.

The *fact* of aid and comfort remains; the guilt of violated international law remains; but there is no statutory provision for *personal* punishment.

See the opinion of Richardson, J., in this case. (Record, 22 to 34.)

Upon the general question of pardon, see Knote's case, No. 92 upon the docket of the current term, to be reported in 95 U. S., and Judge Loring's opinion therein,

and to reinaugurate loyal State governments within and for their respective States: Therefore * * * a full pardon is hereby granted," &c, upon condition of taking and keeping the prescribed oath of allegiance. (13 Stats., 737–8.) The proclamation of May 29, 1865 (13 Stats., 758) declares that its predecessors were issued "to induce all persons to return to their loyalty," &c. It then offers conditional pardon to all (except certain persons) who shall take an oath of allegiance therein specified. Of similar tenor and purport was the proclamation of September 7, 1867 (15 Stats., 699, 700). Collie did not and could not comply with the requirements of either of these proclamations. His petition was filed June 7, 1867. If his *status* at the date of that application is to determine his rights (Carroll *vs.* United States, 13 Wall., 153, near top), then he has no standing in court.

But what we wish especially to urge in this connection is, that as Collie and other foreigners were evidently not contemplated by these proclamations, there is no just reason to suppose they were intended to be included in those of July 4 and of December 25, 1868. (15 Stats., 702; *Id.*, 711, 712.) This last, at its conclusion, like its predecessors, offered a "restoration of *political* rights." United States *vs.* Klein, 13 Wall., 142; Lamar *vs.* Brown, 92 U. S., 195.)

Of every pardon there must be an acceptance. (United States *vs* Wilson, 7. Pet., 161.)

The conditions of a conditional pardon must be performed. (Mrs. Armstrong's case, 13 Wall, 155, bottom; Hyams' case, 7 C. Cls. R., 443; Waring's case, *Id.*, 501; Scott's case, 8 C. Cls. R., 447; *Ex parte* Wells,

18 How., 307; Semmes *vs.* United States, 91 U. S., 27, last three lines.) Now, Collie has never complied with the terms of the conditional pardon, which was the only one existing when he filed his petition; therefore the act of filing and prosecuting his petition cannot be deemed an acceptance.

IV. It is "offenses against the United States" that the President has power to pardon. (U. S. Const., Art. II, sec. 11, cl. 1; 11 Att. Gen.'s Ops., 452.)

The acts done must be crimes under the Federal statutes, since our courts have no criminal common-law jurisdiction. (*Ex parte* Bollman, 4 Cr., 75; United States *vs.* Hudson, 7 Cr., 32; United States *vs.* Coolidge, 1 Wheat., 415; United States *vs.* Beavans, 3 Wheat., 336.)

It must be some offense for which he can *then* be *criminally* punished by the Federal courts, for which alone one can be pardoned by the President. If Collie could not have been convicted upon indictment, then the pardon of December 25, 1868, has no relation to him.

Although his conduct may have been unlawful by the law of nations, which this court declares part of our laws, yet unless he could be personally punished under our legislation, there is nothing for a pardon to reach.

The *fact* of aid and comfort remains; the guilt of violated international law remains; but there is no statutory provision for *personal* punishment.

See the opinion of Richardson, J., in this case. (Record, 22 to 34.)

Upon the general question of pardon, see Knote's case, No. 92 upon the docket of the current term, to be reported in 95 U. S., and Judge Loring's opinion therein,

(10 Ct. of Cl., 398 to 408); Cook *vs.* Freeholders of Middlesex, 26 N. J. Law (2 Dutcher), 329, near top, and pp. 330, 331, 334, 339, 341 to 343, 345, and 346; same case, 27 N. J. Law (3 Dutcher), 637; Deming's case, 10 Johns., 232–3.

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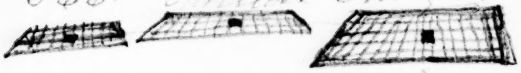

Strong — 5-641

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

JOHN YOUNG, TRUSTEE,
vs.
THE UNITED STATES.
No. 781.

APPEAL FROM THE COURT OF CLAIMS.

RÉSUMÉ OF THE ARGUMENT FOR THE DEFENDANTS.

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The course of the argument for the appellees is thus outlined:

I.

We accept for our premise that contended for by the claimant: The recognition of belligerent rights as belonging to both parties during the late civil war. While conceding this we would not overlook the important qualification that the United States did not by recognition of the insurgents as belligerents, abridge any of their *sovereign* powers, but merely waived their assertion as to *persons* engaged in rebellion.

Because of this state of belligerency, the United States

possessed the right of capture. (Authorities below cited.) The seizure of this cotton was an exercise of it.

Haycraft *v.* United States, 22 Wall., 92.

Legislation did not *confer*, but only *modified*, this right.

Ib.

Smith *v.* Brazleton, 1 Heiskell, 59 to 61.

Price *v.* Poynter, 1 Bush, 388 to 395.

Mrs. Alexander's Cotton, 2 Wall., 419, 420.

Prize Cases, 2 Black, 671, bottom.

Brown *v.* United States, 8 Cranch, 122, 123, and 149 to 151, and 154.

Upton's Mar. Warf. (1861), 87.

No. Am. Rev. for Apr., 1872, 399.

Planters' Bank *v.* Union Bank, 16 Wall., 496, bottom.

Coolidge *v.* Guthrie, 8 Am. Law Reg. (N. S.), 24.

The Emulous, 1 Gall., 582 and 583.

Gray Jacket, 5 Wall., 369, bottom.

United States *v.* Padelford, 9 Wall., 531.

Miller *v.* United States, 11 Wall., 305.

Sprott *v.* United States, 20 Wall., 462.

Lamar *v.* Brown, 92 United States, 187.

II.

Being captured, title to the property vested wholly in the United States, qualified only by legislation, and to the extent only that the statutes expressly declare. No man could thereafter deraign title thereto, nor claim its avails, except through the United States, and by showing the chain of circumstances which our statutes prescribed to constitute a valid claim to the net proceeds.

Lamar *v.* Brown, 92 United States, 195.

Brown *v.* United States, 8 Cranch, 131, per Story, J.
The Elsebe, 5 C. Rob., 173, 181, *et seq.*
The Melomane, *Id.*, 41, 48.
The Mary Francoise, 6 *Id.*, 282.
The French Guiana, 2 Dodson, 151.
The Thetis, 3 Hagg., 231.
The Joseph, 1 Gall., 558.
The Liverpool Hero, 2 Gall., 188, 189.
Alexander *v.* Duke of Wellington, 2 Russ & Mylne, 11 Eng., ch. 54.
Taylor *v.* Nashville & Chattanooga Railroad Company, 6 Coldwell, 649, bottom.
Vattel, Book III, ch. xi, § 229.
3 Phil. Int. Law, 209–212, § cxxx.
Haycraft *v.* United States, 22 Wall., 92, 94.

III.

This right of capture applied to the property of a non-resident alien, bought by him *flagrante bello* and paid for by goods and munitions run through our blockade. It applied to such *property* as this was, from its very nature and situation, irrespective of ownership. Had its nature been different, the United States possessed the right to treat it as enemy-property if it belonged to an alien who, by the gift of money and guns to our foes, and by entering into partnership with them, had constituted himself, in fact, an enemy to us; so that he could no longer rightfully claim to be considered as a neutral, even though his country were so. If ordinary cash purchases would be protected, the cotton exchanged for and representing munitions of war run through our blockade cannot be.

This justifies the capture and retention of the property by the United States, on the triple ground of its ownership, its nature, and the character of the transactions in it.

1. As to personal hostility see—

Miller *v.* United States, 11 Wallace, 311, 312.
The Prize Cases, 2 Black, 674, middle.
Kennett *v.* Chambers, 14 Howard, 48, 49.
Price *v.* Paynter, 1 Bush., 392, top.
2 Twiss' Law of Nat., 435, § 215.
1 Levi's Int. Law, Introduc., xlv. and xlvi.
1 Chitty's Comm'l Law, 395.
Chitty's Vattel, 328, Book iii., ch. 6, pp. 96 and 333, §102.
3 Phillimore Int. Law., 728.

2. As to the hostile nature of the property, and Collie's being an enemy *sub mo do*, by relation to it, see cases hereinbefore cited, and—

1 Kent's Com., *80.
Halleck's Int. Law, 715, § 25, and 720, §34.
Bentzon *v.* Boyle, 7 Cranch, 199.
The Wm. Bagaley, 5 Wall., 405, and citations.
Cummings *v.* Diggs, 1 Heisk., 72, 73.
The Mary Clinton, Blatchfd. Pr. Cas., 560.
The Phenix, 5 C. Rob., 21.
The Vrow Anna, *Id.*, 161, and 4 *Id.*, 119.
The Ann Green, 1 Gall., 286, and citations.
Levi's Int. Law, Intro., xliv.
Upton's Mar. Warf., ch. iii., pp. 44 et seq., 64, 69, et seq.
1 Chitty's Comm'l Law, ch. 8, pp. 395 et seq., 404, 406, 408, et seq., and citations.

Thompson's Laws of War, ch. 1, § 2, pp. 21, 27, and 28.

3. As to the effect of Collie's dealings, see citations of preceding paragraphs; also,

Miller *v.* United States, 11 Wall., 305.

3 Phillimore's Int. Law, § ccccIxxxiv., citing the Susa, 2 C. Rob., 255.

The Rendsborg, 4 *Id.*, 121.

The government does not claim to *punish* Collie, nor to affect him with any *forfeiture* for an *offense;* but that the property was rightfully captured; a complete title thereby vested in the United States Government, which could do as it pleased with the same, directing what should constitute a claim *under its grant* to the proceeds.

It is to be further remarked that, if we concede (for the sake of the argument) that only the goods concerned in "the transaction" (as appellant's counsel repeatedly say) are to be seized, then Collie's whole dealings in and with this property in law and in fact constitute "the transaction" which is to be regarded.

IV.

The right to capture such property absolutely and irrevocably, was at least as extensive within hostile territory as upon the high seas. The ground of seizure on the ocean is, that it is a part of the theater of war.

De Burgh's Mar. Int. Law, 1, 2.

2 Twiss' Law of Nat., 440.

2 Wildman's Inst. of Int. Law, 1, 9.

Dana's Wheat., § 355, note, 171.

Halleck's Laws of War, 446, ch. xix, § 1; 714, ch. xxix, § 25; 721, § 35.

Levi's Com. Law, Intro., xliv.

The right of seizure is universal "wherever the property is found. The protection of *neutral* territory is an *exception* to the general rule only."

The Vrow Anna, 5 C. Rob., 17.

V.

The United States were always rightfully sovereign at Savannah, even whilst belligerents there. They acted in the war in both capacities.

Rose *v.* Himely, 4 Cranch, 272.

Gelston *v.* Hoyt, 3 Wheat., 324.

Prize Cases, 2 Black, 673.

Miller *v.* United States, 11 Wall., 306, and citations.

Lamar *v.* Brown, 92 U. S., 195.

United States *v.* Diekleman, *Id.*, 525, 526.

Hammond *v.* State, 3 Coldw., 138.

Billgerry *v.* Branch, 19 Grattan, 401 to 403, per Rives, J.

Savigny's Int. Law, 138, ch. 1, § xxiv.

Westlake's Int. Law, 243, ch. viii, § 260.

Collie's title was acquired subject to the liability of its being then and there defeated by a capture, *jure belli*, by our forces.

The Santissima Trinidad, 7 Wheat., 349, top.

Its acquisition by him violated our rights and public policy as a sovereign, as well as our belligerent rights.

Ib.; Kennett *v.* Chambers, 14 Howard, 38, 50 to 52.

Totten *v.* United States, 92 U. S., 105.
Whitefield *v.* United States, *Id.*, 170.
Desmare *v.* United States, 93 U. S., 612.
Sprott *v.* United States, 20 Wall., 459.
The Ann Green, 1 Gall., 287.

VI.

The only question really at issue is, Has Mr. Collie brought his case within the strict terms of the statute under which alone the Court of Claims has jurisdiction to give him judgment for the proceeds of this cotton?

R. S., § 1074.

Haycraft *v.* United States, 22 Wall., 92.

Is he "a *qualified* proprietor," entitled to receive restitution?

The Vrow Anna, 5 C. Rob., 163.

Lopez *v.* Burslem, 4 Moore's Privy Council Cases, 305.

Creasy's Int. Law, 517, § 488.

That no such proof has been or can be (in fact) made is too evident to require the citations found in our brief; therefore they will not be repeated here.

Collie's counsel claim the proclamation of general amnesty to be the substitute for, and equivalent of such proof.

About the *effect* of a pardon "in cases where it applies" there is no difference of opinion.

Carlisle *v.* United States, 16 Wall., 151.

It does not apply to Collie.

1. It is offered only by the sovereignty to those owing it allegiance. Lamar *v.* Brown, 92 United States, 195. See the language of the several proclamations.

2. A pardon is *personal*. Collie is not a criminal, indictable under our laws, when the proclamation of December 25, 1868, was issued. His property was not seized for forfeiture as that of an *offender;* therefore, it is not to be restored after the proclamation. (Miller *v.* United States, 11 Wall., 305.) It was seized on account of *belligerency*, not of *crime*. Belligerency, as a status of individuals or of property, ceased when the war did; but the doctrine of *uti possidetis* applied to property already acquired by the government by capture, unless (and then only so far) as it chose otherwise to provide by statute.

It is only offenses against the United States that the President can pardon, *i. e.*, crimes.

United States Const., Art. II., sec. 11, ch. 1.

Ex p. Bollman, 4 Cranch, 75; United States *v.* Hudson, 7 Cranch, 32.

United States *v.* Coolidge, 1 Wheat., 415.

United States *v.* Beavans, 3 Wheat., 336.

Of every pardon there must be an acceptance, or performance of its condition, where conditional.

United States *v.* Wilson, 7 Peters, 161.

Mrs. Armstrong's case, 13 Wall., 155.

Ex p. Wells, 18 Howard, 307.

Semmes *v.* United States, 91 U. S., 27.

See also Knote's case, No. 92 of current term; 10 Ct. of Cl., 398 to 408.

Cook *v.* Freeholders of Middlesex, 2 Dutcher (26 New Jersey Law), 329, 330, 331, 334, 339, 341, to 343, 345, and 346; and same case in 3 Dutcher (27 N. J. Law), 637.

Deming's case, 10 Johnson, 232 and 233.

VII.

The legal interest of Collie's "friends," or co-venturers, was the same as his own. His petition is untrue as to the ownership of the cotton.

R. S., sec. 1072.
1 Parsons on Shipping, 111, 117.
Starbuck *v.* Shaw, 10 Gray, 492.
Holderness *v.* Schakels, 8 B. and C., 612.
Mumford *v.* Nicolls, 20 Johns., 611.
Nicolls *v.* Mumford, 4 John., Ch. 522.
Hart *v.* Fitzgerald, 2 Mass., 509.
Austin *v.* Walsh, *id.*, 401.
Peters *v.* Davis, 7 Mass., 257.
Baker *v.* Jewell, 6 Mass., 460.
Robinson *v.* Cushing, 11 Maine, 480.

EDWIN B. SMITH,
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In the Supreme Court of the United States.

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JOHN YOUNG, TRUSTEE, &C.,
v.
THE UNITED STATES. } No. 781.

UPON APPELLANT'S MOTION FOR CERTIORARI.

Brief for the United States.

4 Otto 260
Marshall B. Mull
Nov 17 1877
Denied

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

JOHN YOUNG, TRUSTEE, &c.,
v.
THE UNITED STATES. } No. 781.

UPON APPELLANT'S MOTION FOR CERTIORARI.

BRIEF FOR THE UNITED STATES.

The appellant moves for certiorari *solely* for the purpose of having incorporated into the record the affidavits and exhibits, &c., which constituted the evidence upon which the Court of Claims granted a new trial of the cause. Two objections are apparent on the bare reading of the motion: 1st, that it is irregular for the Court of Claims to return, as part of its record, the evidence upon which its action is based; and, 2d, that its ruling, in granting or refusing a new trial, is not reviewable in this court upon appeal.

I.

In no case should the evidence itself be incorporated into the record sent up here on appeal from the Court of

Claims. United States *v.* Adams, (6 Wall., 111,) citing Burr *v.* Des Moines Co., (1 Wall., 102, ¶ 2;) Barnes *v.* Williams, (11 Wheaton, 416;) Prentice *v.* Zane, (8 Howard, 485, 486;) Reid *v.* De Wolf, (Wright, 418.)

"There is no principle better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. This rule applies as well *to every judgment or decree rendered in the various stages of their proceedings*, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. *Every matter adjudicated becomes a part of their record*, which thenceforth proves itself *without referring to the evidence on which it has been adjudged.*" Voorhees *v.* Bank of United States, (10 Peters, 472.)

Indeed, the testimony is properly never any part of the record in the court below. Baltimore and Potomac Railroad Company *v.* Trustees, (91 U. S., 130;) Nichols *v.* Williams, (8 Cow., 16, top;) People *v.* Vermilyea, (7 *Id.*, 137;) Kirby *v.* Wood, (16 Maine, 82, 83, per Shepley, J.;) Starbird *v.* Eaton, (42 Maine, 571;) Lovell *v.* Eaton, (48 Maine, 263;) Hahn *v.* Kelley, (34 Cal., 391;) Mandeville *v.* Perry, (6 Call., 78, 83, per St. Geo. Tucker, J.;) Cunningham *v.* Mitchell, (4 Rand., 189;) Clark *v.* Gibson, (2 Ark., 114, lower half;) Cole *v.* Driscoll, (1 Blackf., 17;) Storer *v.* White, (7 Mass., 448;) Pierce *v.* Adams, (8 Mass., 383;) Bank of Virginia *v.* Bank of Chillicothe, (16 Ohio, 170;) Kendig's Ap., (80 Penn. St., 71, middle;) Harvey *v.* McAdams, (32 Mich., 473, 478.)

Nor are the affidavits of claimants and others. Kibble *v.* Butler, (14 S. & M., 207;) Mann *v.* Russell, (11 Ill., 587;) Magher *v.* Howe, (12 Ill., 381;) Hodges *v.* Ashurst, (2 Ala., 301.)

Nor motions, whether supported by affidavit or not, even if set out in the transcript. Abbee *v.* Higgins, (2 Iowa, 535;) Christy *v.* Myers, (21 Mo., 112;) United States *v.* Gamble, (10 Mo., 457;) Hinton *v.* Brown, (1 Blackf., 429;) Coolidge *v.* Ingles, (13 Mass., 51; 148 & M., 207; 11 Ill., 587; 2 Ala., 302.)

And this court said of a motion for a new trial, per Marshall, C. J.: "Such a motion is not a part of the proceedings in a cause." United States *v.* Daniel, (6 Wheaton, 548.)

Nothing can be made part of the record by calling it by that name. Nichols *v.* Bridgeport, (27 Conn., 459, 465; 91 U. S., 130, and other cases cited *supra.*)

A few cases may be mentioned to show what portions of the record *certiorari* is intended to bring up, where they have been casually omitted, viz: a citation, Field *v.* Milton, (3 Cranch, 514;) an execution, Barton *v.* Petit, (7 Cranch, 288;) judgment of nonsuit; Elmore *v.* Grymes, (1 Peters, 472;) the part of a charge to the jury which has been duly excepted to; Stimpson *v.* Westchester Co., (3 Howard, 556.)

II.

1. If the depositions and exhibits were properly incorporated into the record, there would then be nothing upon which this court could act, since the granting or refusal of a new trial is discretionary with the Court of Claims, and hence not reviewable upon appeal. United States *v.* Daniel, (6 Wheaton, 548;) Daniel *v.* R. R. Co., (3 Wallace, 255, top;) Hall *v.* Weare, (92 U. S., 728, 732–3;) Baker *v.* White, (*Id.*, 176;) Macomb *v.* Knox Co., (91 U. S., 1;) Parcels *v.* Johnson, (20 Wallace, 653; Davis *v.* Braden, (10 Peters, 286;) Smith *v.* Vaughan,

(*Id.*, 366;) Packer *v.* Nixon, (*Id.*, 408;) Borough of Sewickly, (2 Grant's cas., 135;) Pratt *v.* Kitterell, (4 Dev., 168;) Gibbs *v.* Co. Commrs., (19 Pick., 299, citing Chase *v.* Blackstone Co., 10 Pick., 244;) U. S. *v.* Lawrence, (3 Dallas, 42; Union Canal Co. *v.* Keiser, (7 Harris, 137.)

Motions for new trial are peculiarly addressed to judicial discretion, to be exercised according to the circumstances of each particular case. Irwin *v.* Morrell, (Dudley, 80;) White *v.* Trinity Church, (5 Conn., 588;) Bright *v.* Eynon, (1 Burr, 390;) Withers *v.* Butts, (7 Dana, 329.)

2. The petition shows that affidavits and exhibits were put in by both parties on this motion for a new trial. In other words, after the allegations of the motion were sustained by proof, counter-proof was adduced by the claimant to defeat the motion, and it was presented upon the evidence and the merits. Thus, the Court of Claims had jurisdiction, and, having jurisdiction, could decide in either way, at its own discretion. Central Pac. R. R. Co., petr. for cert., *v.* Placer Co., (43 Cal., 368, 369.)

3. Whether or not new testimony was contained in the affidavits and exhibits filed in support of the motion, and whether the testimony, "cumulative or otherwise," *ought* to have satisfied the Court of Claims that fraud, wrong, and injustice had been done the United States can only be ascertained by an examination of *all* the evidence, and a comparison of the new with the old. Into such an examination this court will not enter, nor could it do so unless *all* the testimony, new and old, were brought into the record.

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